Book-Ending the Problem of Bail: Examining the Front and Back Ends of Bail in Canada
A Report for the Department of Justice, Canada

Cheryl Marie Webster
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Table of Contents

Executive Summary and Policy Implications

1. Administration of justice charges are clearly an important feature in the Canadian criminal justice system. First, their numbers are non-trivial. Second, their numbers – especially for failure to comply with a court order (typically bail) – have been growing over time, despite a declining crime rate generally. Third, a significant number of people are imprisoned as a result of convictions for them. Taken together, a targeted reduction in this type of offence would potentially have a significant impact on not only the number of cases brought into the criminal justice system but also the number of people in correctional facilities.

2. The notion that administration of justice offences constitute a homogeneous group of criminal offences and, by extension, a singular problem (for which there is a single solution) needs to be reassessed. Indeed, one the notable characteristics of administration of justice offences is their significant variability across jurisdictions. On the one hand, there are pronounced differences across provinces/territories in terms of the rates at which adults are charged with three of the most common types of this category of offences. As such, a reduction in the rate of adults charged with one grouping of administration of justice offences (e.g., failure to appear) will differentially affect some jurisdictions more than others. On the other hand, there are also significant differences in the relative use of them across administration of justice groupings. Indeed, while one jurisdiction may have a particular problem with one type of administration of justice offence (e.g., failure to comply with a court order), it may have a low rate of adults charged with another type (e.g., breach of probation). Indeed, despite federal legislation governing criminal law, provincial/territorial 'culture' would appear to have its own impact, producing varying levels of 'local' practices with respect to administration of justice offences.

3. Equally notable, this substantial (cross-sectional) variability across regions as well as provinces/territories in the use of administration of justice offences is also paralleled by significant (longitudinal) variability in trends over time in the rate of adults charged with this type of offence. Indeed, the simple characterization of administration of justice charges as "growing" in number in Canada does not adequately describe all groupings of administration of justice offences within all provinces and territories. Even the patterns for individual types of administration of justice offences vary across place and time. Tentatively, one might suggest that "local" provincial/territorial factors are important in understanding the growth in the use of any given administration of justice offence. Indeed, even when one examines 'Failure to Comply with is Court Order' offences – which have shown the greatest growth generally over time and across most jurisdictions – the rate of increase (in absolute as well as relative terms), the point in time in which the increase began, and the most recent trends vary in non-trivial ways across provinces/territories.

4. Perhaps less well known is that differences in the use of administration of justice charges also exist – quite dramatically in some cases - across individual cities within a particular province/territory. Such differences within the same jurisdiction are difficult to understand. On the one hand, given that the use of administration of justice offences at the city level cannot be fully explained by overall crime rates, this intra-jurisdictional variability seems

to suggest that something beyond provincial policies are impacting the use of administration of justice offences. 'Local' culture emerges again as an important factor when considering the use of administration of justice offences. On the other hand, this finding underlines the importance of disaggregating administration of justice offences. Indeed, certain administration of justice offences are clearly used more often than others and their use also varies by city. Particularly within the context of certain police charging practices, such city-level differences may provide valuable opportunities to identify 'best practices'.

5. It is useful to remember that what people sometimes refer to as the 'bail problem' is, in fact, separate from the 'remand problem' in terms of reform efforts. The 'bail problem' typically relates to the number of people being detained for a bail hearing, the number of appearances necessary to achieve an outcome, the number of people detained until trial. The 'remand problem' typically relates to the size of Canada's remand population. These are, conceptually, and in terms of the policies to change them, likely to involve somewhat distinct issues.

6. The size of Canada's remand population (counts of people in prison per 100,000 in the general population) has been increasing until very recently. However, the size of this phenomenon, and the shape of the growth in the remand population, vary considerably across provinces and territories. Indeed, the common practice of comparing remand rates across jurisdictions for a particular (often the most recent) year clearly masks very different trajectories or trends over time. In fact, one would be tempted – once again – to suggest that there are very distinct 'local causes' at play within each jurisdiction. Similarly, the tendency to talk about remand as a single problem needs to be questioned.

7. The remand population is clearly not driven by crime rates *per se*. Indeed, remand admissions, in at least some provinces, appear to change quite independent of crime rates. In an analysis of two provinces, we found that in one (Ontario), remand rates appeared to be driven largely by longer stays in remand, once admitted. Indeed, Ontario has seemingly been successful in being able to reduce the number of people remanded to prison. However, this 'improvement' has been reduced somewhat by what would appear to be more general problems associated with court delay. Somewhat differently, the growth in remand counts in the other province (Manitoba) appeared to be driven by not only increased admissions to remand but also longer stays while there. Again, the notion that a single 'solution' will resolve the 'remand problem' is likely naïve. As decisions are being made at each point in the criminal process, intervention is likely required on a number of different fronts, with a number of different criminal justice actors and likely through a number of different strategies.

8. More broadly, given that the law governing bail (and the prosecution of cases, more generally) is the same across the country, the data do not appear to be consistent with the view that the 'remand problem' relates directly to identifiable changes in the law. Indeed, if the growth in remand were due to changes in the law, one would expect that the changes in the remand populations would follow similar patterns across time. This does not appear to be the case. Rather, it would appear that the growth in remand occurred for two separate –

yet identifiable – reasons. On the one hand, increases in the number of people entering the provinces' prisons as remand prisoners is seemingly a contributing factor. On the other hand, and quite separately, increases in the number (and proportion) of people who spend long times in remand (e.g., greater than 6 months) appears to also be a source of the problem. However, it is equally likely that there will be variability across jurisdictions even in terms of these two issues (and, by extension, potential strategies of intervention). We find ourselves – once again – suggesting that such variability may reflect – at least in part – more 'local' explanatory factors.

9. Given the general over-representation of Indigenous peoples in Canada's prisons, it was not surprising to find that Indigenous peoples are over-represented in remand admissions across Canada. More surprising, however, is the finding that the size of this problem is increasing. In Ontario, for example, the rate of (overall) remand admissions has been decreasing in recent years, but the proportion of those who are Indigenous and admitted to prison on remand has been increasing rather steadily throughout this century.

10. In fact, it would seem that regardless of the shape of the changes in the overall remand admission rates in a province/territory, the growth in the proportion of those admitted to remand who are Indigenous peoples is generally going up. More importantly, it is generally going up (as a proportion of remand admissions that are Indigenous) even though the shape of the growth in the remand admission rates varies somewhat across time (i.e. increasing, decreasing or remaining relatively stable). Note that there is no obvious reason for the *proportion* of Indigenous peoples in remand admissions to increase. One might have expected that this already over-represented group would simply remain as a constant portion of the remand admissions. This does not appear to have been the case. Rather, not only are Indigenous peoples admitted into remand custody at a rate that exceeds dramatically their representation in the general population, but this proportion is generally increasing in most jurisdictions. Potentially if we were to focus some attention on understanding the reasons for the over-representation (and often growing over-representation) of Indigenous peoples in remand admissions, we might be able to understand and address not only this issue, but also the changes in remand admissions more generally.

Introduction

Perhaps one of the biggest misnomers within current discussions about criminal court concerns in Canada is the reference to the 'bail problem'. While no informed person would likely suggest that the bail process[1] – as it currently operates – does not require urgent attention, the notion that there is one singular 'problem' – and, by extension, one unique solution to resolve it – would be naïve (to say the least). Rather, the current state of bail in Canada is not only the result of the combination and interaction of a multitude of (organizational, administrative, procedural,

[1] The expression 'the bail process' should be understood within the context of this report to encompass not only police activity (in determining which accused persons will be detained for a bail hearing) and bail court proceedings (in which bail is determined) but also correctional facilities (which house those detained prior to a bail hearing, until trial or until sentencing).

legislative, cultural) factors and processes but also the product of 20-30 years of beliefs and practices which have slowly developed and permeated the entire bail system, ultimately re-defining the very notion of what it is that we are trying to accomplish.

Within this context, any program of change would be misguided to suggest that there are any easy, quick fixes. On the contrary, problems appear largely to be systemic, embedded in the culture of bail court and its wider criminal court context. Indeed, Canadians have seen the adoption – over time – of a risk aversive mentality whereby the principal role of the criminal justice system has become one of avoiding (or at least reducing to a minimum) any potential risks to society that offenders may represent. Within the context of bail, this cultural climate of risk aversion and risk management has translated into vigorous attempts to avoid releasing accused persons who might subsequently commit crimes while on bail. As such, strategies of intervention will need to be conceptualized as part of a multi-faceted approach which recognizes that isolated changes will have little effect without altering this broader mentality impacting the criminal justice system as a whole. However, even this approach requires a much clearer understanding of how bail court fits within the wider context.

To this end, this preliminary study proposes a somewhat different strategy. To date, there have been a number of studies which have attempted to examine the ways in which bail court is currently operating. In particular, issues such as the request of adjournments, recourse to sureties, the application of conditions, the role of video remand, the use of bail verification and supervision programs, the scheduling of show-cause hearings, the creation of bail teams, case management, etc., have been the target of various studies, evaluations and reports. What is less well understood are the factors/processes occurring at the front and back ends of the bail process. Specifically, less attention has been given to the role of the police in terms of their charging practices – especially with respect to administration of justice offences – as well as the various factors impacting remand populations at the back end of the bail process. This report will focus on these two issues as a first step to understanding the wider administrative or procedural context of the 'bail problem'. As part of this broader focus, an initial scan of bail practices/legislation in several other countries will also be included, as well as some final thoughts on potential directions for reform.

Methodology

We would argue that one of the most under-utilized datasets that is useful to better understanding the wider context of the 'bail problem' is the Canadian Socio-Economic Information Management System (CANSIM). Produced by Statistics Canada, this computerized database covers a wide variety of social and economic aspects of Canadian life including police recorded 'crimes/offences', court decisions and remand populations within 'correctional services'. In simplistic terms, there are three areas of the criminal justice system in which data are collected:

1) Data are collected from police services across Canada on crime incidents (and whether people are charged).

A crime incident that is recorded by police may include a number of separate "crimes". Thus – whether or not an accused has been identified and charged – it is the "most serious charge" that defines the incident. The most serious violation is determined by the following criteria: violence takes precedence over other offences; where both charges are violent in nature, the maximum penalty is used to determine which charge defines the incident. If the maximum penalty is the same, it is up to the police service's discretion as to which charge is deemed most serious (see Boyce, 2015 for more details). The counting of "crime incidents" is one measure while the counting of persons actually charged (adults or youths) is another. There are a host of factors (e.g. age, demeanour, use of drugs and alcohol, etc.) related to whether or not a formal charge will be laid by police for criminal behaviour (see Carrington and Schulenberg, 2003). Indeed, while police crime incidents/charge data are often used as a measure of overall crime in society, it is important to recognize that they also reflect police policies (e.g., allocation of resources to certain types of offences) and practices (e.g., use of discretion).

2) Data are collected from the criminal courts on cases that are brought to court and disposed of. Typically a 'case' is included in the data for a given year only when it is completed.

When examining "cases" in court (found guilty, sentenced to custody, etc.), a 'case' is defined as the combination of all charges against the same person having one or more key overlapping dates (date of offence, date of initiation, date of first appearance, date of decision, and date of sentencing). In cases in which two or more offences have resulted in the same decision (e.g., guilty), the Canadian Centre for Justice Statistics (CCJS) uses the most serious offence to describe the case. The most serious offence is identified by the average length of prison sentence imposed (see Milligan 2010, pg. 16 for further details).

3) Data are collected on admissions to community programs and prisons as well as releases from these programs. Separate from these data, 'counts' of people in these programs on an average day are sometimes available.

In the area of corrections data, we also use remand "counts" and "admissions". A "count" captures the number of people detained in remand custody on an average day. This measure is very different from the number of people "admitted" to detention facilities prior to sentencing. Obviously one individual may be admitted multiple times in a year. These two measures give very different pictures of the remand issue. However, in either case, the remand population includes all those accused in pre-sentence custody. The belief is that most of these individuals are awaiting trial but also include those who have been found guilty and awaiting sentence.

Importantly, the data from each of those three areas have limitations. For example, there are well-known problems with using police recorded "crime" as a measure of "offending" (see Bala, Carrington and Roberts, 2009 or Doob and Sprott 2008). Most notably, many crimes occur which do not come to the police's attention. Of those that do come to the police's attention, only the more serious offences are likely to be charged while very minor offences (e.g. marijuana smoking in public by youths in certain neighbourhoods) may not even be recorded by the police.

More broadly, CANSIM data have the disadvantage of not permitting the researcher to manipulate the data. Rather, one is forced to use the data as they are presented, without the ability to combine the variables in different ways from which they appear. As an illustration, CANSIM Table 2510022 presents data on custodial admissions (sentenced, remand and other) by jurisdiction and by Aboriginal identity of the prisoner. CANSIM Table 2510023 presents data on custodial admissions (sentenced, remand and other) by jurisdiction and by age of the offender. While both tables contain valuable information in terms of different descriptions of custodial admissions, it is not possible to examine custodial admissions (sentenced, remand and other) by Aboriginal identity and by age. Said differently, it is not possible to combine the two tables in a way which would allow the researcher to examine how many older (versus younger) Aboriginal prisoners were admitted to custody. Indeed, the researcher is limited to the variables used by CANSIM as well as by the various combinations of them. While reducing the researcher's freedom to examine issues not provided by the CANSIM tables, this limitation is not a criticism of CCJS. Rather, it simply reflects one of the necessary mechanisms in order to make the data available to the public.

These limitations aside, the advantages of these datasets for the current study are multiple in nature. First, they are national is scope, providing a snapshot of Canada as a whole, as well as the ability to breakdown the country into individual jurisdictions and even smaller units of analysis (e.g., cities). Second, they provide time series data, permitting an examination of trends over time. Third, they are updated as soon as data are available for public use, arguably constituting the most recent available data. Fourth, they are publicly available through Canadian Universities. Fifth, the researchers on this project have extensive experience using these data. Sixth, this dataset presents data on both police activity as well as corrections.

And finally, the data can be easily downloaded, permitting us to create individualized spreadsheets that we can present for the specific purposes of this study. Indeed, while Statistics Canada has produced a number of very useful Juristats on police charging practices, administration of justice offences and correctional institutions, they (understandably) lack the specific focus of the 'bail problem' and, as a result, do not examine any of these relevant factors in any detail. Notably, the window – which can be created by these data – into the context in which the 'bail problem' is occurring will arguably constitute a valuable framework for even more detailed examinations of these issues as soon as Statistics Canada releases the Integrated Criminal Court Survey (ICCS) database to the Research Data Centres (RDC) currently housed in a number of Canadian Universities.

I - Administration of Justice Charges[2]

a) Importance within the Criminal Justice System

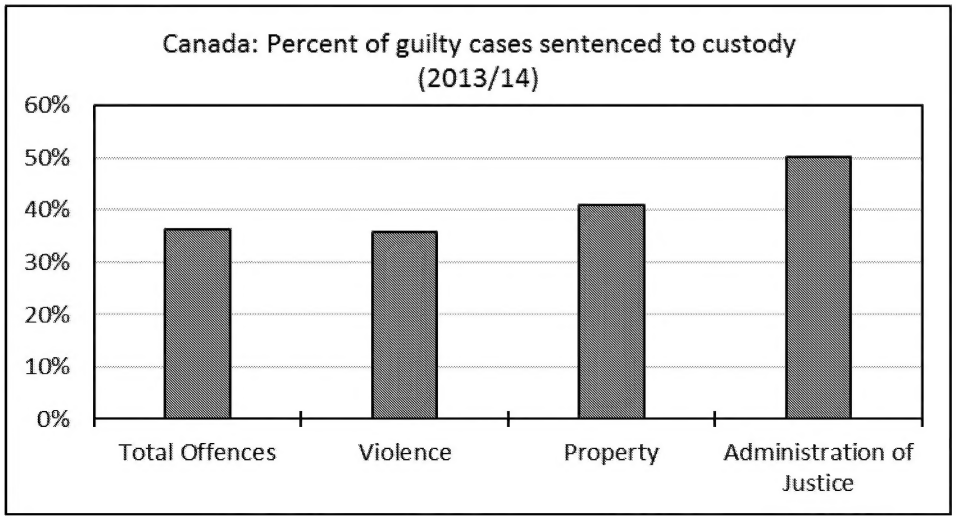
Administration of justice (AoJ) charges[3] appear to be taken quite seriously by the courts and police in Canada. The easiest way to see how serious administration of justice charges are seen by

[2] Administration of justice charges include: failure to appear, breach of probation, unlawfully at large, failure to comply with an order, and other administration of justice offences.

[3] *Charges* should not be confused with *Cases* since obviously cases are sometimes composed of multiple charges. For these data, a "case" can be thought of as all of the charges against a single individual in which there are one or more court appearance dates that overlap in the same court house.

the courts is to contrast the outcome of *cases* in which the most serious charge is an administration of justice charge compared to other types of charges. Figure 1 demonstrates that, overall, cases with AoJ charges as the most serious or only (remaining) charge, are considerably more likely to end up with a custodial sentence than are other types of cases. Indeed, across Canada in 2013/14, about 36% of cases with a finding of guilt ended up with a custodial sentence (Figure 1). For administration of justice charges, it was 50%.

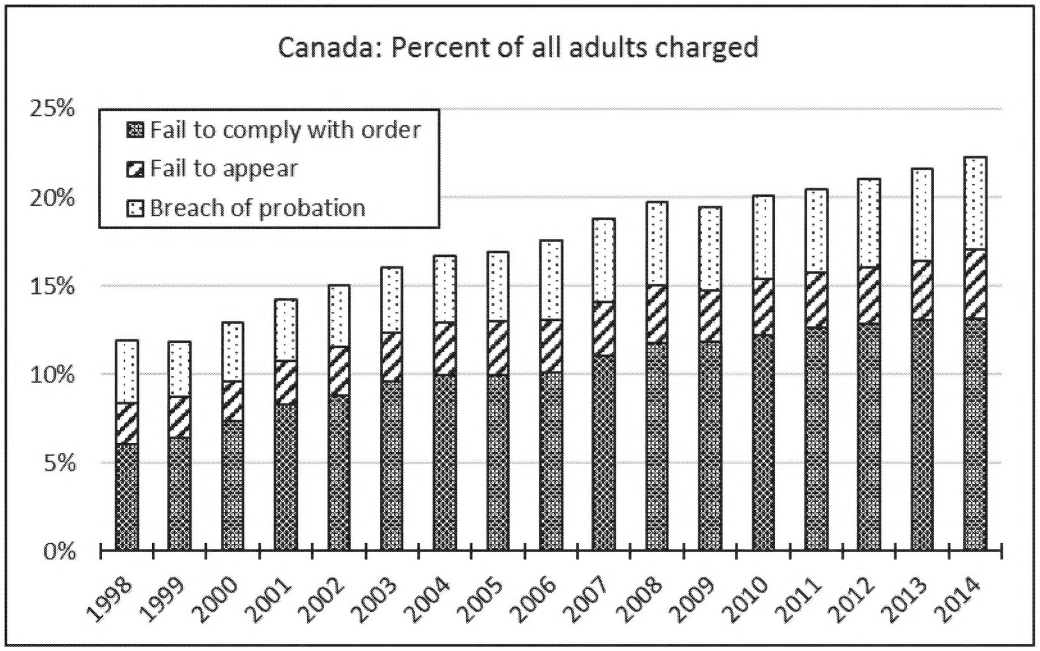
Figure 1



The second indication of the importance of AoJ charges is the fact that the number of them has been increasing in recent years across all of Canada. Figure 2 examines the three most common types of administration of justice charges – failing to comply with an order, breach of probation and failing to appear[4]. Looking at police (UCR) data, we see that the proportion of incidents described as breaches of probation, failing to appear or failing to comply with an order (FTCwO) (as the most serious charge within the incident) has been increasing since 1998. Among all adults charged, these three offences accounted for 11% of adults charged (as the most serious charge) in 1998 and by 2014 they accounted for 22%.

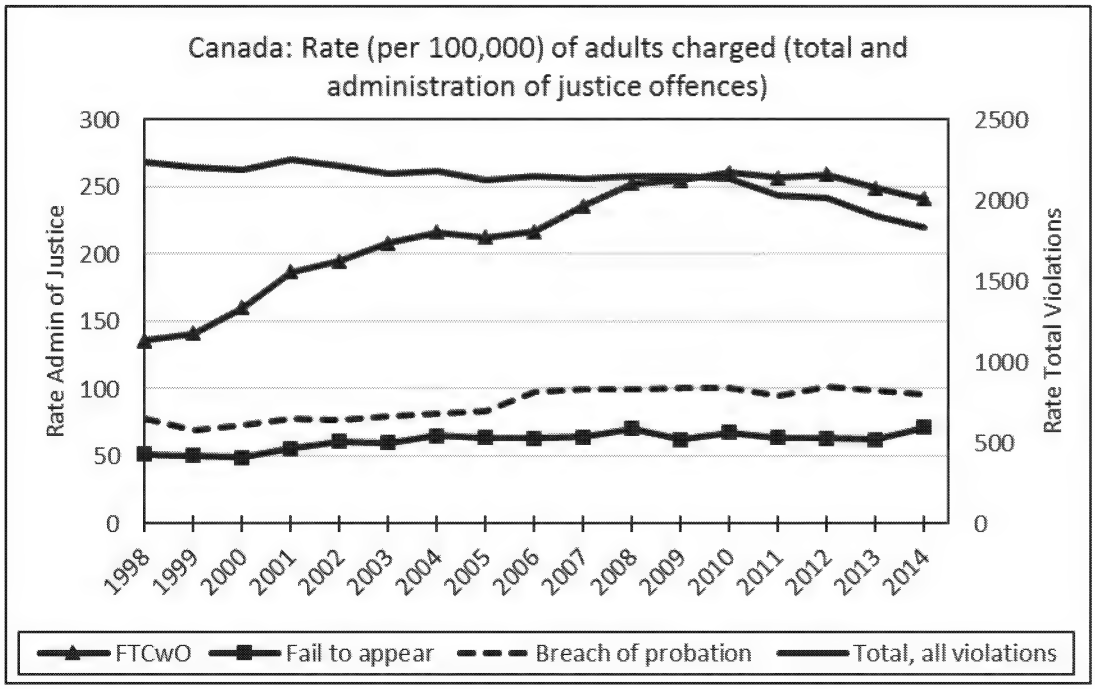
[4] It should be noted that these types of administration of justice offences constitute *categories* created by the Canadian Centre for Justice Statistics. Importantly, they represent *combinations* of different offences into groupings. They are given labels (by CCJS) which attempt to capture the essence of the category. However, they do include other charges. For example, the category of "failure to comply with a court order" (which is probably typically a 'bail condition' violation) also includes violations of the family of s.810 orders under s. 811.

Figure 2



The reason for the increases in the proportion of adults charged for these offences could, of course, be due to the fact that the overall rate of charging is declining. That is, if the overall rate of police charging is declining but the rates of charging for these AoJ offences is stable, then they will obviously account for a larger proportion of the charges. However, this is not the reason for the increased proportion of these charges. While the rate (overall) of police charging has been declining (see Figure 3, solid black line), the rate of charging for these three offences has been *increasing* (see Figure 3, dotted, triangle and square lines).

Figure 3



One might be tempted to conclude that the widespread risk-aversive mentality which has seemingly permeated the entire criminal justice system over the last several decades may also explain – at least in part – the increase in police targeting practices of AoJ offences. Equally notable, although all three types of AoJ offences have been increasing over time, the largest increase has occurred with FTCwO. One might suggest that either police have targeted this AoJ offence more than the others or this type of AoJ offence has become more prevalent than the others. Certainly within the context of bail, the rapidly increasing recourse to (numerous) conditions placed on release orders as well as the longer times taken to resolve criminal cases would arguably support the latter explanation.

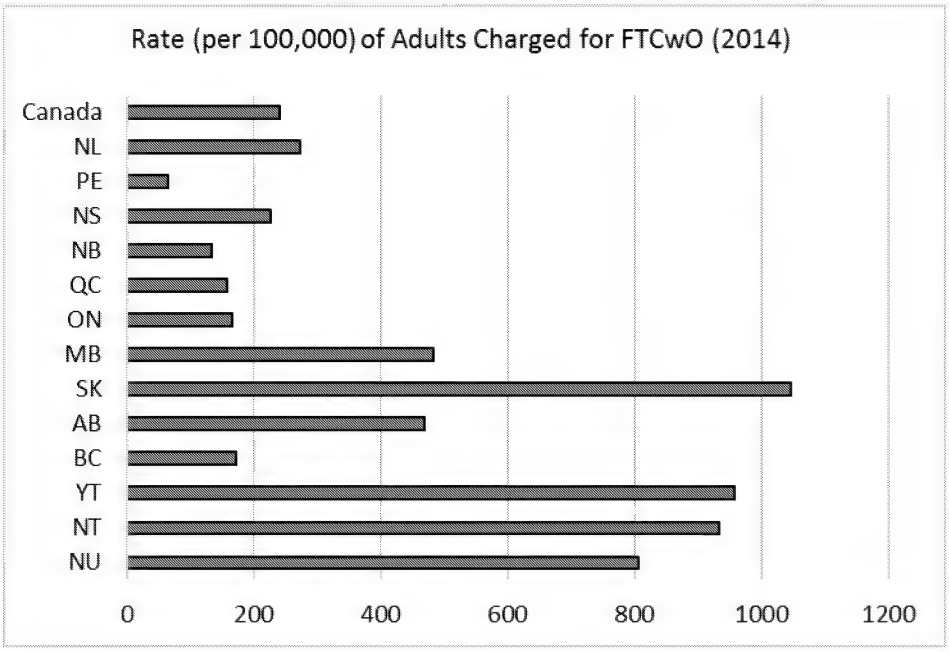
In brief, AoJ charges are clearly an important feature in the Canadian criminal justice system. First, their numbers are non-trivial. Second, their numbers have been growing over time, despite a declining crime rate generally and, presumably by extension, a decreasing overall rate of police charging. Indeed, they would seem out of step with the wider trends in crime. Third, a significant number of people are imprisoned as a result of convictions for them. Taken together, a targeted reduction in this type of offence would potentially have a significant impact on not only the number of cases brought into the criminal justice system but also the number of people in correctional facilities.

b) Inter-Provincial Variability

Administration of justice charges are also important because there appears to be considerable variability associated with these types of offences. Indeed, there are significant differences across provinces and territories in the use of AoJ charges. Figures 4 through 6 show the rather dramatic provincial variation that exists in the rates of police charging in 2014 for FTCwO, failing to appear (FtoA) and breaches of probation (BoP).

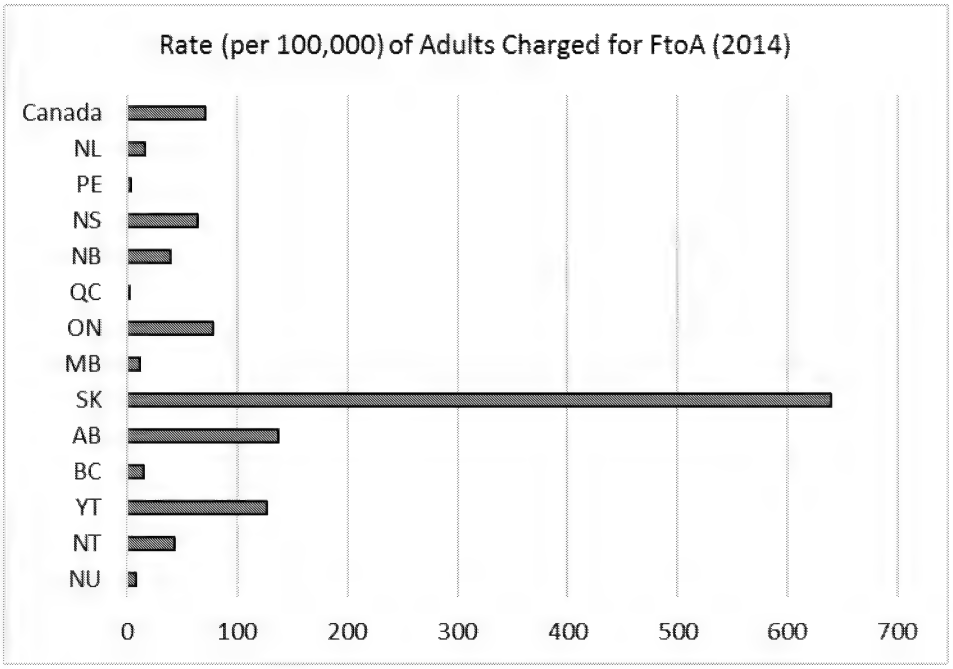
Looking first at FTCwO, there are dramatically different rates across provinces (Figure 4). For example, the rate of police charging for FTCwO in Prince Edward Island in 2014 was 65.37 per 100,000 adults while right next door in Nova Scotia, the rate was almost three and a half times higher at 227.0. In Saskatchewan, on the other hand, the rate was 1,046 adults charged per 100,000 adults in the province (or about 1 person charged per 100 adults in the province).

Figure 4



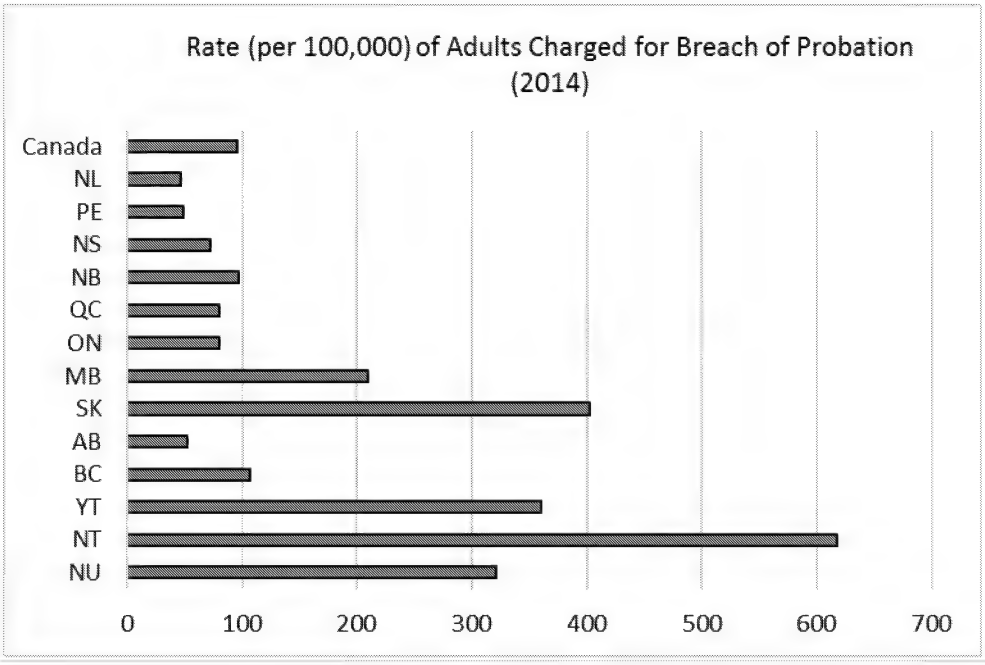
Saskatchewan also stands out with a charge rate for FtoA of 639.84 per 100,000 (Figure 5). Alberta (as the next highest province) is about one quarter of this rate – 137.74 adults charged per 100,000 adults in the province. On the other hand, the other Prairie province – Manitoba – is interesting as its rate of charging for this AoJ offence is one of the lowest at 11.37. Notably, one might recall that this province had the second highest rate of charging for FTCwO (excluding the territories). Similarly, while the rates of FTCwO are also very high for the 3 territories, their rates of FtoA are within what one might consider the 'normal range' within Canada.

Figure 5



A similar picture emerges when one examines Figure 6. In terms of the rate of BoP, while Saskatchewan continues to dominate the provinces with a charge rate of 403 per 100,000 adults, Alberta (as its neighbour) displays a rate of only 52. Further, this latter province has one of the lowest rates of BoP but had the second highest rate of FtoA.

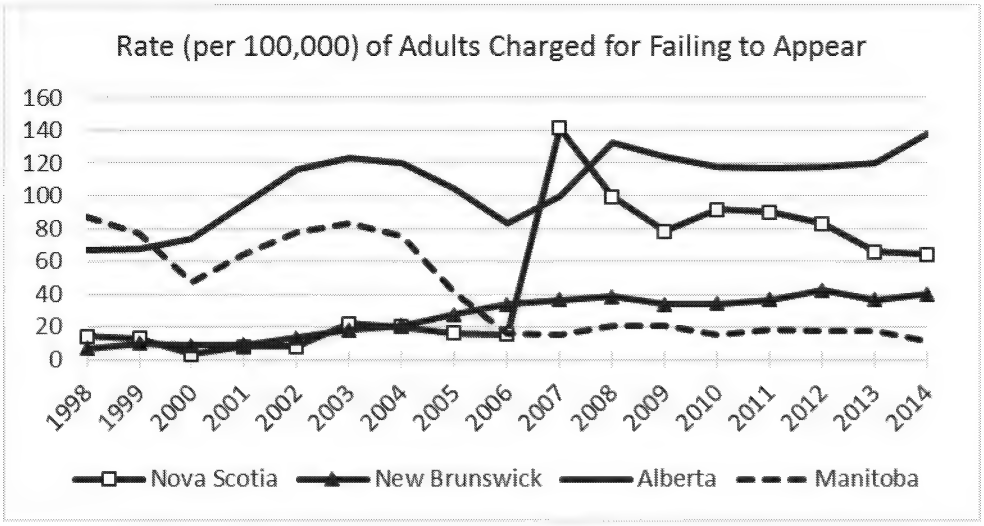
Figure 6



In brief, it would appear that AoJ offences are not a single problem. On the one hand, there are pronounced differences across provinces/territories in terms of the actual rates at which each type of AoJ offence is charged. As such, a reduction in the rate of adults charged with one grouping of AoJ offences (e.g., FtoA) will differentially affect some jurisdictions (SK, AB, YT, ON, NS) more than others (QC, PE, MB, NU, BC). On the other hand, there are also significant differences in the relative use of them across these three AoJ groupings. Indeed, while one jurisdiction (e.g., NL) may have a particular problem with one type of AoJ offence (FTCwO), it may have a low rate of adults charged with another type (BoP).

Clearly, some of the current differences are related to diverse patterns over time. Taking FtoA as an illustration, Figure 7 describes the trends over time in the rate of adults charged with this AoJ offence for 4 jurisdictions. For instance, one can note dramatically different patterns between Alberta and Manitoba in the rate of police charging for FtoA between 1998 and 2014. While both provinces started with a relatively similar – high – rate (roughly 67-87 per 100,000) in 1998, Alberta continued to climb over the entire time period (ending at 138 per 100,000) while Manitoba gradually dropped (ending at approximately 11 per 100,000). As another example, Nova Scotia and New Brunswick showed very similar rates from 1998 to 2004 at which point New Brunswick saw a slow gradual increase (ending at roughly 40 per 100,000) while Nova Scotia witnessed a huge increase in 2007 (140 per 100,000) which slowly declined over time (ending at approximately 60 per 100,000) in 2014.

Figure 7



The different patterns shown in Figure 7 are equally notable because they display jurisdictions within the same region. Indeed, even provinces which arguably share broad regional similarities demonstrate very different trends across time. Specifically, one might have expected to see similar trends over time across the two Atlantic provinces, just as one might have anticipated similar patterns across the two Prairie provinces. In neither case was this true.

In fact, these 'intra-regional' differences in trends over time in the rate of adults charged with FtoA simply foreshadow substantial variation in trends over time not only across *each and every* jurisdiction but also across the *three AoJ groupings* within each jurisdiction. Figures 8 through 20 show the trends in the rate (per 100,000) of police charging for the three most common AoJ offences (FTCwO, FtoA and BoP) for the provinces and territories from 1998 to 2014.

Figure 8

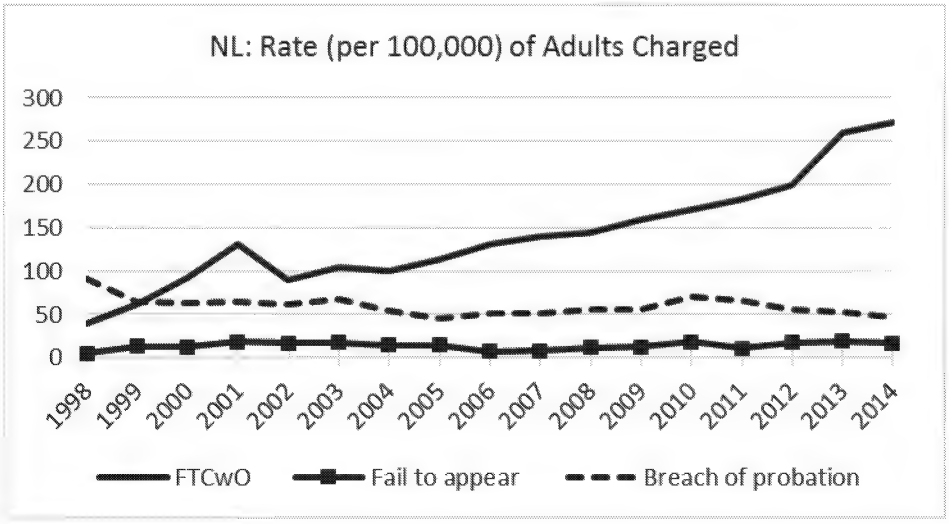


Figure 9

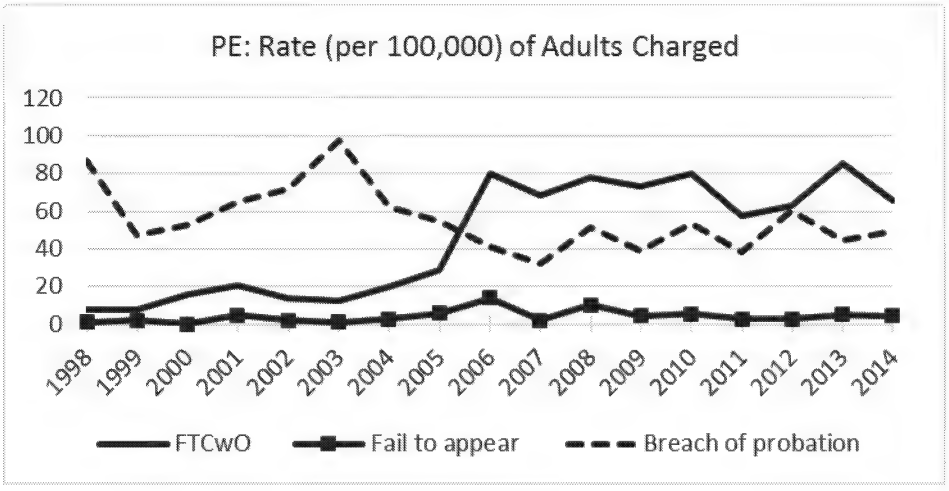


Figure 10

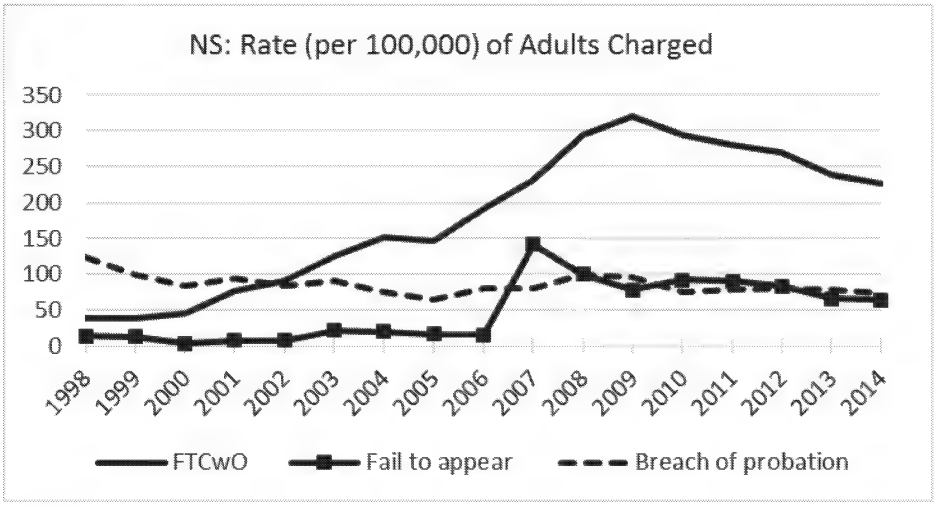


Figure 11

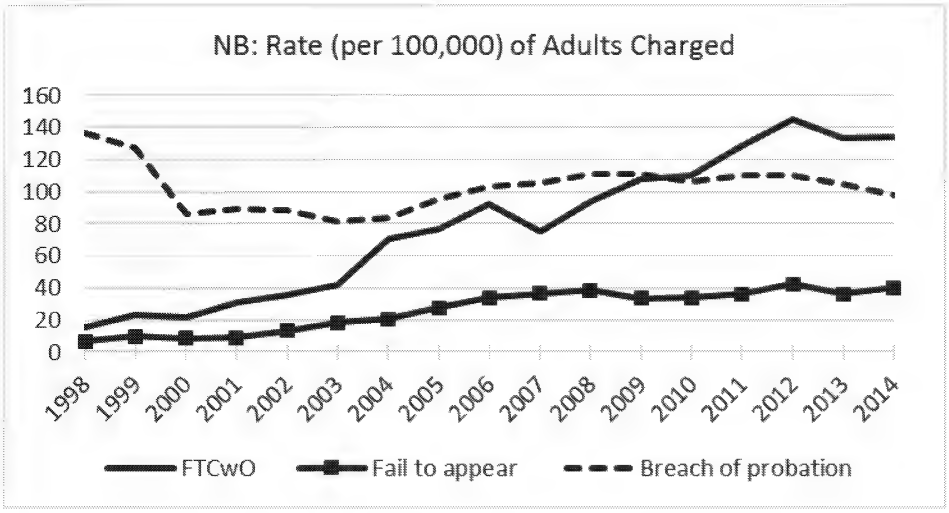


Figure 12

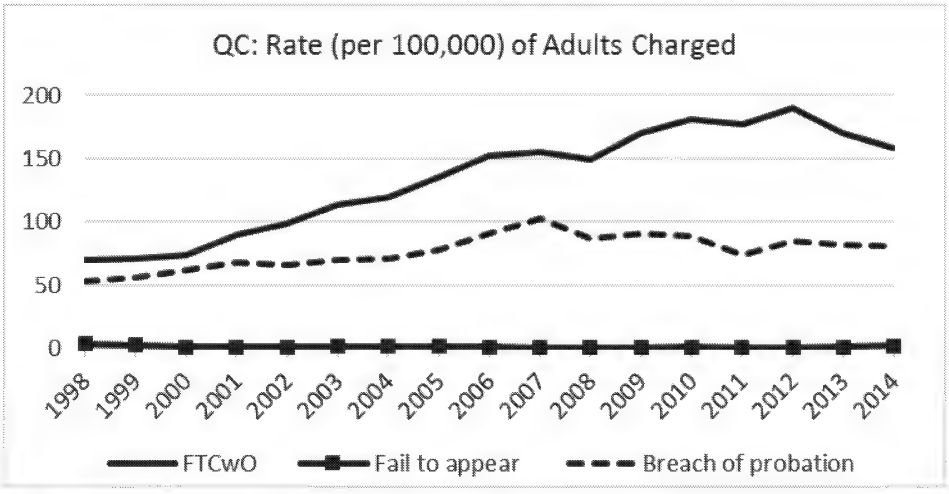


Figure 13

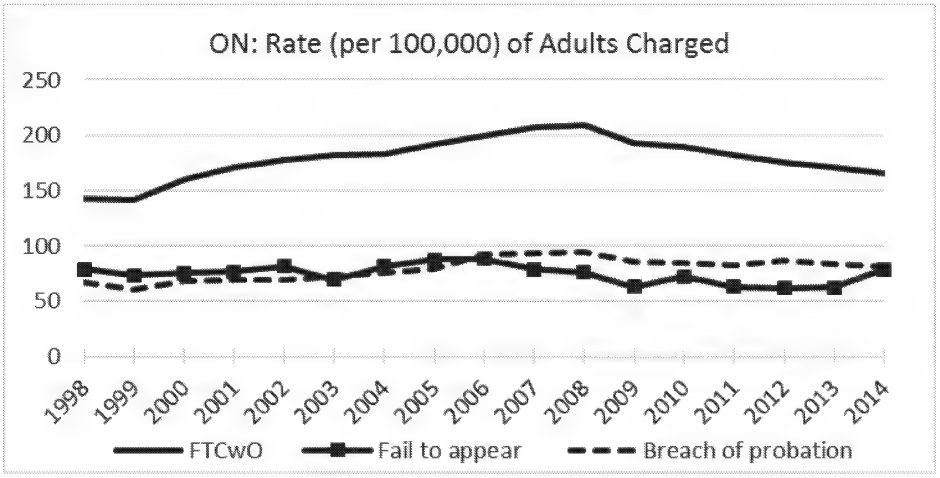


Figure 14

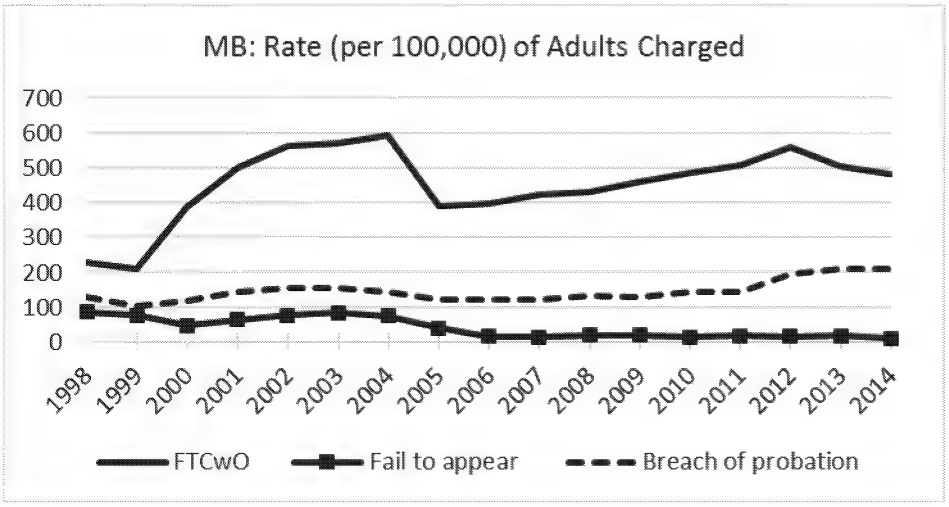


Figure 15

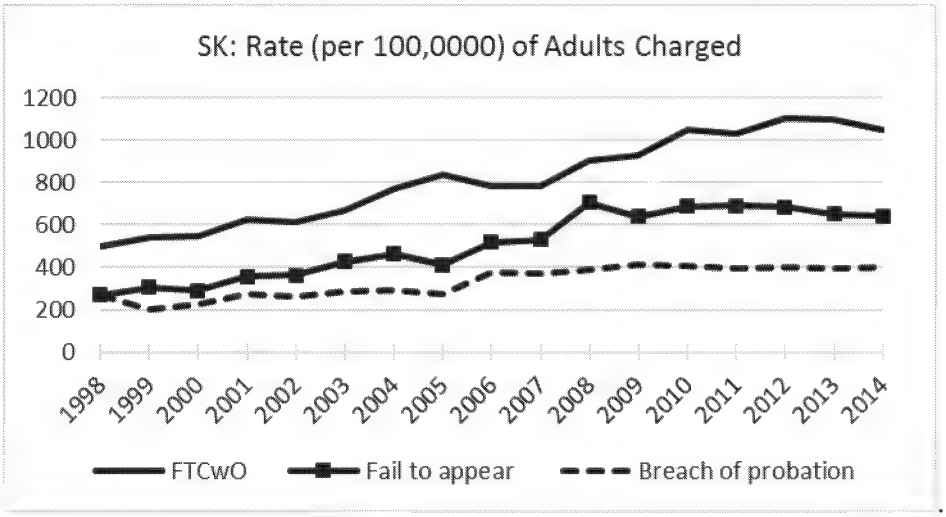


Figure 16

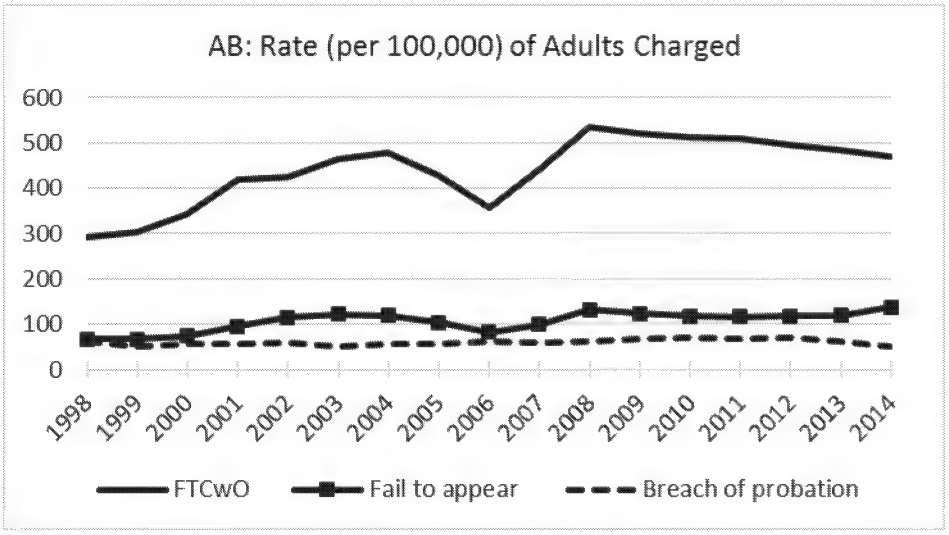


Figure 17

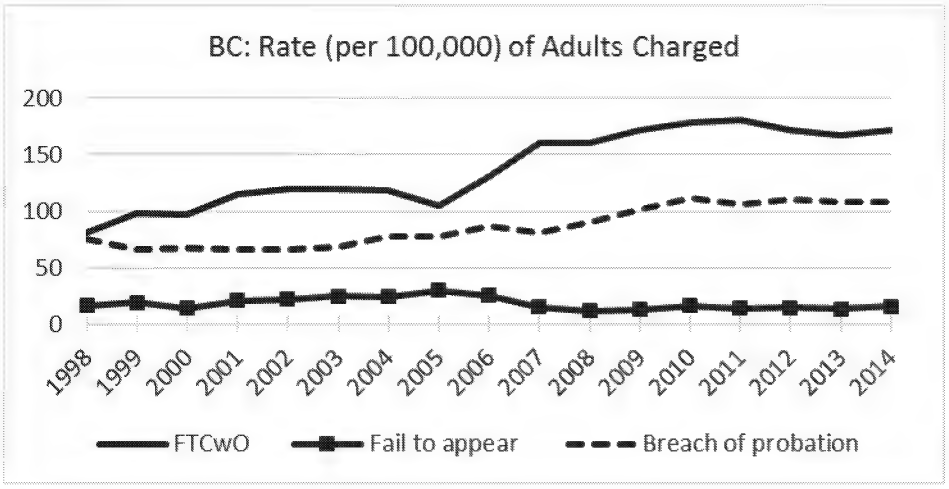


Figure 18

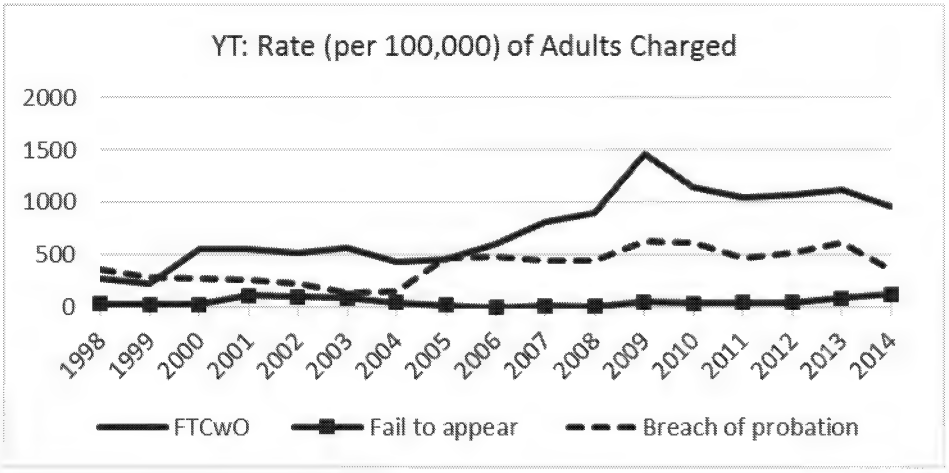


Figure 19

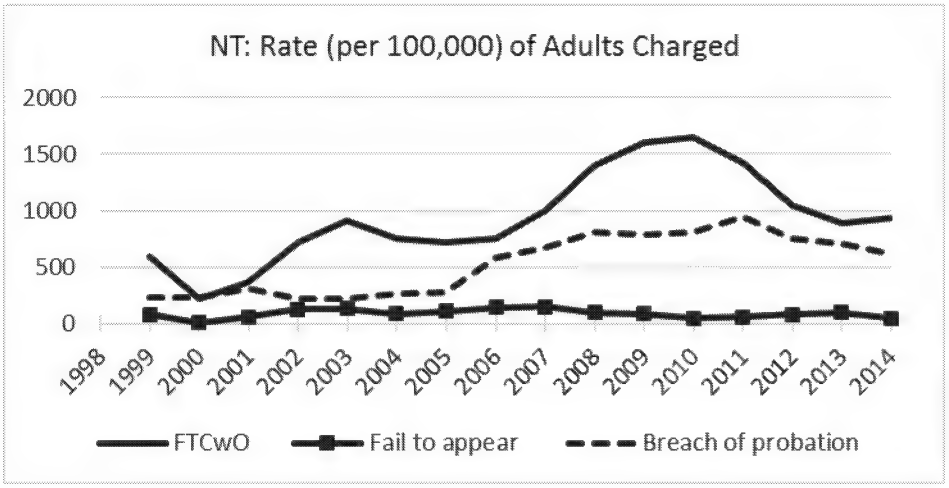
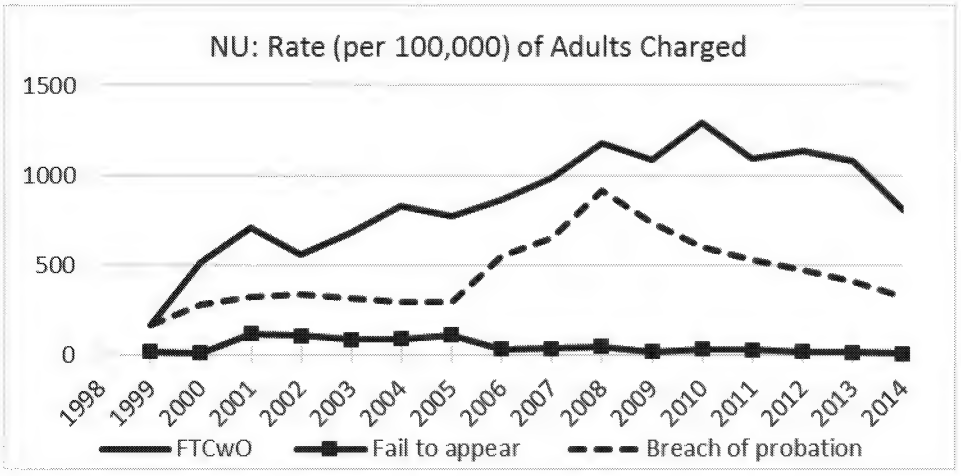


Figure 20



Most notably, all jurisdictions see the highest rates of charging concentrated in FTCwO, although PE and NB arguably stand out as having relatively similar rates of charging for FTCwO and BoP. Saskatchewan stands out as having the highest rate of charging for FTCwO and the rate for this group of offences has been rather steadily increasing since 1998. In fact, all jurisdictions have seen increases in the rate of police charging for FTCwO but more recently several jurisdictions (e.g. NS, QC, ON, AB, YT, NT, NU) have started to show declines.

Second, the rate of police charging for BoP has generally been stable or declining. The exceptions would be Manitoba in which there has been a recent slight increase and Saskatchewan and BC in which the rate had been increasing until around 2009/10 and then began to stabilize. Further, while QC, YT and NT have started to show declines in this AoJ offence, the rate of adults charged for BoP is still higher in 2014 than it was in 1998.

Third, the rate of adults charged for FtoA has been relatively stable over time. Having said this, Manitoba is again an exception in which this AoJ offence has been declining. The other exceptions would be Nova Scotia, New Brunswick, Saskatchewan and Alberta in which FtoA offences have been increasing. Having said this, Nova Scotia's increase was concentrated substantially in one year (in 2007) and despite having been slowing declining since then, it is still substantially higher than in 1998. Diversely, the increases in New Brunswick and Alberta appear to be more persistent over time. In Alberta, the graph obscures the size of the increase in the rate of charging for FtoA. It started out, in 1998, at a rate of 67.0 per 100,000 and by 2014, it had doubled to a rate of 137.74 per 100,000. In sharp contrast, Manitoba witnessed an enormous decline in the rate of charging for this offence. However, the graph again obscures the change: while it was 87.1 in 1998, it had dropped to 11.38 per 100,000 by 2014. Still somewhat differently, Saskatchewan saw rather large increases in the rate of charging adults for FtoA from 1998 (269.39 per 100,000) until 2008 (704.1 per 100,000) when the rate began to stabilize somewhat. Most recently, there have been very slight declines in the last couple of years.

In brief, it is – once again – clear that the simple characterization of AoJ charges as "growing" in number in Canada does not adequately describe all groupings of AoJ offences within all provinces and territories. Rather, there is also substantial variability in trends over time in the rate of adults charged with this type of offence – not only across regions but also individual jurisdictions. Further, even the patterns for each AoJ grouping of offences vary across place and time. Tentatively, one might suggest that "local" provincial/territorial factors are important in understanding the growth in the use of any given AoJ offence. Indeed, even when one examines FTCwO offences – which have shown the greatest growth generally over time and across most jurisdictions – the rate of increase (in absolute as well as relative terms), the point in time in which the increase began, and the most recent trends vary in non-trivial ways across provinces/territories.

c) Intra-Provincial Variability

Less well known – and perhaps more interesting and informative about the role that AoJ offences play in the Canadian criminal justice system – is that there is also substantial variation across individual cities *within* provinces. Two examples make our point. The first focuses on two cities within Alberta (contrasting Calgary and Edmonton) while the second examines three Ontario cities (contrasting Toronto, London and Thunder Bay). Obviously, these 'within province' differences could reflect differences in *behaviour* of those citizens in these cities. But the differences, especially when very large, could well reflect differences in the *use* to which different AoJ offences are put within the different cities.

Example One: Calgary and Edmonton

The contrast of Calgary and Edmonton constitutes a dramatic example of intra-jurisdictional differences (Table 1). We begin, in Table 1, by showing the differences in the rates of charging for all offences, for all AoJ offences, for FTCwO, BoP and FtoA.

Table 1

	Rate of Adults Charged per 100,000 in Calgary and Edmonton									
	All violations		Total: AoJ		FTCwO		Breach of Probation		Fail to Appear	
	Cal.	Edm.	Cal.	Edm.	Cal.	Edm.	Cal.	Edm.	Cal.	Edm.
2004	2,397	3,365	378	1,143	294	787	48	28	3.5	265
2005	2,301	3,021	356	953	264	651	46	25	3.3	216
2006	2,220	2,513	379	527	287	310	46	28	2.9	141
2007	1,833	2,875	309	841	235	572	33	39	7.0	177
2008	1,800	3,250	288	1,144	215	779	34	41	9.9	275
2009	1,834	3,093	315	1,041	235	690	45	51	10.0	257
2010	1,710	3,042	295	1,000	222	664	42	57	7.2	235
2011	1,614	2,904	305	966	232	643	39	51	8.5	226
2012	1,454	2,882	286	967	221	618	35	71	7.3	227
2013	1,366	2,854	264	922	214	569	26	55	5.7	246
2014	1,334	2,927	250	942	208	564	21	44	6.5	286

There are two broad differences that can readily be seen in Table 1. First, the rates of adults charged for all violations (which include AoJ offences) and the AoJ offences (alone) are considerably higher in Edmonton than in Calgary. Second, the direction of the changes over time is all of declines, except for the rate at which adults in Edmonton are charged with BoP and FtoA.

Figures 21 and 22 suggest that there are important differences in Edmonton and Calgary that need to be considered when looking at (and interpreting) these divergences. Most notably, the 2 cities vary considerably in their crime rates. Rates of total crime recorded by the police (Figure 21) and adults charged overall (Figure 22) are higher in Edmonton than Calgary, although in both cities during this period, incidents reported to police and adults charged were decreasing.

Figure 21

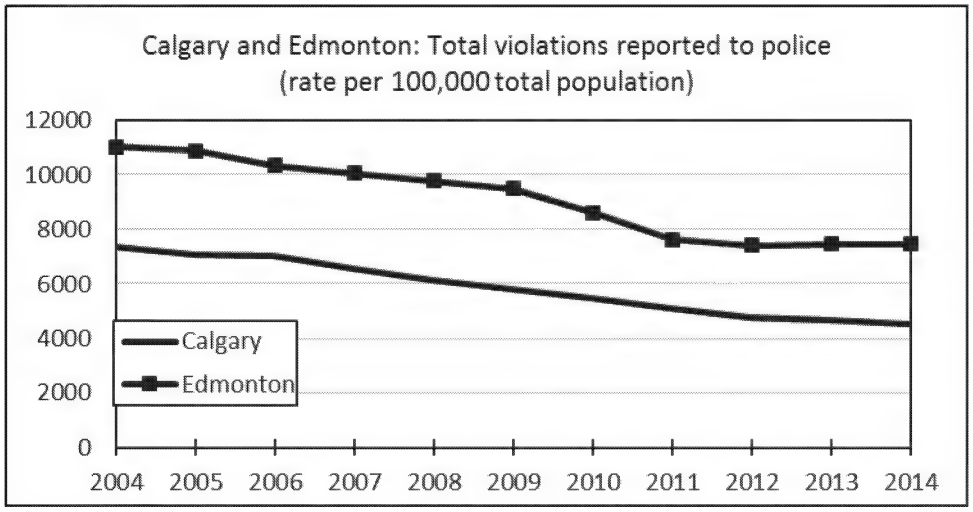
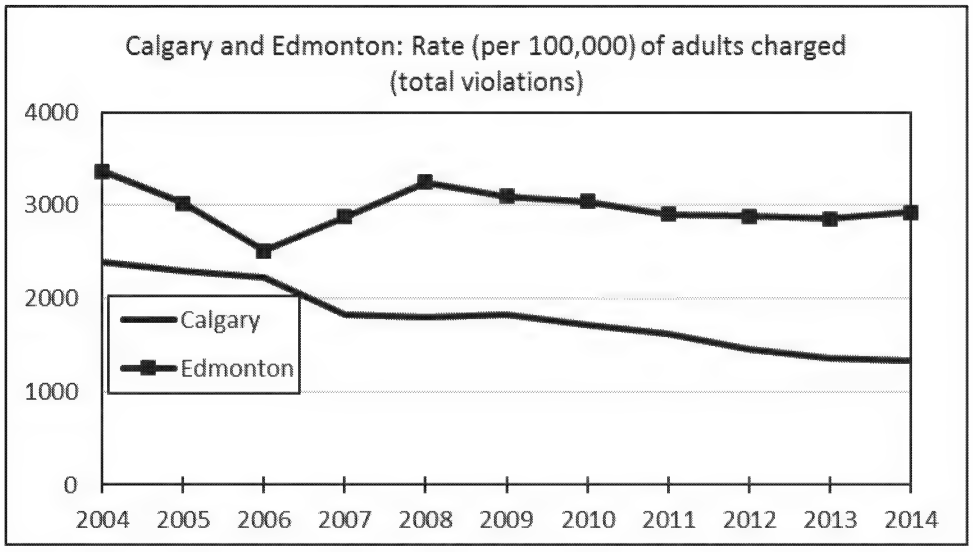


Figure 22



Within this context, it is tempting to disregard the original differences (in Table 1 above) between these two cities (which, at first glance, looked interesting) as ultimately not so interesting. Edmonton simply has a higher crime rate (and charge rate for adults). Hence, it is not surprising that Edmonton has a higher rate of charging for the various AoJ offences.

However, this interpretation would have missed an important distinction. If it were simply that Edmonton charges a greater number of people for all types of offences, we would still expect that the proportion of those charged who were being charged with AoJ offences would not differ between the two cities. Table 2 shows that in Edmonton (versus Calgary), AoJ charges are simply more common when expressed as a percent of their overall charge rate. For example, AoJ charges accounted for 32.2% of adults charged in Edmonton in 2014 but they accounted for only 18.8% of adults charged in Calgary (Table 2).

Indeed, it would seem that Edmonton targets AoJ offences to a greater degree than does Calgary. Interestingly though, this practice holds for FTCwO and FtoA, but not for BoP offences. Specifically, in Calgary, 15.6% of those charged with any offence in 2014 were charged with FTCwO; the comparable figure for Edmonton for 2014 is 19.3%. Likewise, in 2014 in Calgary, 0.5% of all adults charged were charged with FtoA compared to 9.8% in Edmonton. In contrast, the percentage of those charged with BoP of all those charged with a criminal offence is almost identical for Calgary and Edmonton (1.6% versus 1.5% respectively).

In brief, Edmonton seemingly charges more adults with AoJ offences than Calgary overall – and especially in the case of FtoA – but not with BoP. Such differences within the same jurisdiction are difficult to understand. On the one hand, they seem to suggest that something beyond provincial policies are impacting the use of AoJ offences. 'Local' culture emerges again as an important factor when considering the use of AoJ offences. On the other hand, they underline the importance of disaggregating AoJ offences. Indeed, certain AoJ offences are clearly used more often than others and their use also varies by city. Particularly within the context of the lower end

of police charging practices, such city-level differences (within the same province) may also provide an intriguing window into what is 'possible' or 'acceptable' by the general public in terms of the use of AoJ offences.

Table 2

	Percent of all those charged who are charged with... (as the most serious charge):							
	Any AoJ Charge		FTCwO		Breach of Prob.		Failure to Appear	
	Cal.	Edm.	Cal.	Edm.	Cal.	Edm.	Cal.	Edm.
2004	15.8%	34.0%	12.3%	23.4%	2.0%	0.8%	0.1%	7.9%
2005	15.5%	31.5%	11.5%	21.5%	2.0%	0.8%	0.1%	7.1%
2006	17.1%	21.0%	12.9%	12.3%	2.1%	1.1%	0.1%	5.6%
2007	16.9%	29.3%	12.8%	19.9%	1.8%	1.3%	0.4%	6.2%
2008	16.0%	35.2%	12.0%	24.0%	1.9%	1.3%	0.5%	8.5%
2009	17.2%	33.6%	12.8%	22.3%	2.4%	1.6%	0.5%	8.3%
2010	17.2%	32.9%	13.0%	21.8%	2.4%	1.9%	0.4%	7.7%
2011	18.9%	33.3%	14.3%	22.1%	2.4%	1.8%	0.5%	7.8%
2012	19.7%	33.5%	15.2%	21.5%	2.4%	2.5%	0.5%	7.9%
2013	19.3%	32.3%	15.7%	19.9%	1.9%	1.9%	0.4%	8.6%
2014	18.8%	32.2%	15.6%	19.3%	1.6%	1.5%	0.5%	9.8%

Example Two: Toronto, London and Thunder Bay

The second example explores the variation that exists within Ontario. Table 3 presents the data on the rates of police charging in Toronto, London and Thunder Bay for all violations, for AoJ and for FTCwO, BoP and FtoA. This table shows that the rate of charging for all violations and for AoJ offences is lowest in Toronto and highest in Thunder Bay. Moreover, while Toronto and Thunder Bay have seen reductions in these rates over time, London increased. London's increases are interesting because while the increases in charging overall stabilized and then began declining around 2009, the rate of charging for AoJ offences never declined. Thus, in 2014, London was not much lower in the rate of charging (overall and AoJ) compared to Thunder Bay. With respect to trends in the rate of charging for specific AoJ offences, London has generally seen increases (except see BoP after 2012) while Toronto has seen declines and Thunder Bay has somewhat mixed trends (e.g., increases for some number of years followed by more recent declines).

Table 3

	Rate of Adults Charged per 100,000: Toronto, London and Thunder Bay														
	All violations			Total: AoJ			FTCwO			Breach of Probation			Fail to Appear		
	Tor.	Lon.	TB	Tor.	Lon.	TB	Tor.	Lon.	TB	Tor.	Lon.	TB	Tor.	Lon.	TB
2004	1,712	2,341	4,104	282	653	1,381	110	370	849	61	111	294	102	126	218
2005	1,776	2,591	3,789	288	809	1,299	114	357	791	62	139	277	101	249	200
2006	1,716	2,813	3,976	251	1001	1,537	111	482	894	56	165	350	72	294	259
2007	1,641	2,734	3,766	248	917	1,484	118	468	881	60	139	349	58	242	234
2008	1,642	2,720	3,807	265	850	1,623	125	430	1,018	74	144	339	52	216	253
2009	1,539	2,552	4,107	230	710	1,496	120	363	944	60	137	305	39	157	225
2010	1,471	2,583	4,077	218	769	1,531	112	405	951	53	151	347	41	161	218
2011	1,428	2,474	3,867	202	764	1,569	106	393	927	49	172	401	34	151	222
2012	1,381	2,506	3,389	183	845	1,485	89	458	866	51	175	421	30	167	181
2013	1,323	2,331	2,903	194	828	1,235	95	470	701	50	160	343	36	160	181
2014	1,242	2,350	2,875	202	925	1,153	86	509	673	50	113	314	55	262	143

However, similar to Calgary and Edmonton, one must consider the broader crime trends when interpreting the differences described above. Figures 23 and 24 show the overall rate of offences reported to the police and the rate of adults charged. Thunder Bay is always the highest, followed by London and then Toronto. In all three cities, the rate of incidents reported to the police has been declining (Figure 23) but the rate of police charging has only been declining in Toronto and Thunder Bay (Figure 24).The rate of adults charged (per 100,000 adults) in London increased and then declined slightly to return to the 2004 levels (Figure 24).

Figure 23

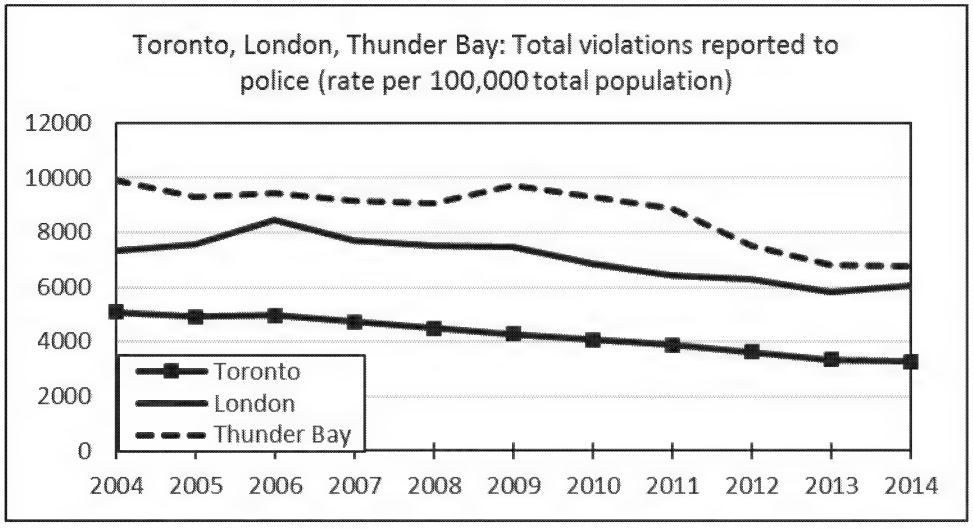
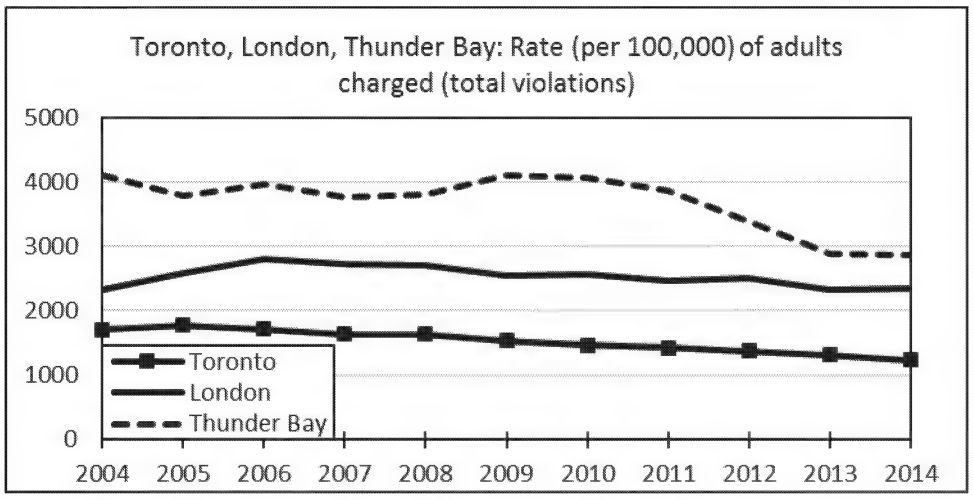


Figure 24



Similar to Calgary and Edmonton, it would again be tempting to suggest that the increases seen in London with respect to charging of AoJ offences is simply due to an overall trend in police charging – that is, it is the one city which has shown a rather stable rate of charging and thus AoJ offences are merely more of the same. Similarly, one might assume that since Thunder Bay has the highest overall rate of offences reported to the police, it would also have the highest rate of adults charged with AoJ offences. But assuming that AoJ charging follows – or can be explained by – the broader trends in police charging in a given jurisdiction misses an important fact: the proportion of AoJ offences is increasing in both London and Thunder Bay. In London, the proportion of adults charged who were charged with any AoJ offence increased from 28% in 2004 to 39% in 2014. In Thunder Bay, the proportion increased from 34% to 40%. In all three cities, FTCwO offences dominate the AoJ numbers. But both London and Thunder Bay appear to target AoJ offences more than Toronto, and in particular, focus, relatively speaking, more on FTCwO offences. Compared to Thunder Bay, London seems – at various points – to focus relatively more on FtoA whereas Thunder Bay is more focused, relatively, on BoP.

Table 4

	Percent of all those charged who were charged with... (as the most serious charge).											
	Any AoJ charge			FTCwO			Breach of Probation			Fail to Appear		
	Tor.	Lon.	TB	Tor.	Lon.	TB	Tor.	Lon.	TB	Tor.	Lon.	TB
2004	16%	28%	34%	6%	16%	21%	4%	5%	7%	6%	5%	5%
2005	16%	31%	34%	6%	14%	21%	3%	5%	7%	6%	10%	5%
2006	15%	36%	39%	6%	17%	22%	3%	6%	9%	4%	10%	7%
2007	15%	34%	39%	7%	17%	23%	4%	5%	9%	4%	9%	6%
2008	16%	31%	43%	8%	16%	27%	5%	5%	9%	3%	8%	7%
2009	15%	28%	36%	8%	14%	23%	4%	5%	7%	3%	6%	5%
2010	15%	30%	38%	8%	16%	23%	4%	6%	9%	3%	6%	5%
2011	14%	31%	41%	7%	16%	24%	3%	7%	10%	2%	6%	6%
2012	13%	34%	44%	6%	18%	26%	4%	7%	12%	2%	7%	5%
2013	15%	36%	43%	7%	20%	24%	4%	7%	12%	3%	7%	6%
2014	16%	39%	40%	7%	22%	23%	4%	5%	11%	4%	11%	5%

Tentatively, it would appear that a number of conclusions might be drawn from these data. First, any suggestion that trends over time, or the rates of charging for specific AoJ offences, are similar across jurisdictions needs to be questioned. Indeed, there is substantial variability in the current charge rates for AoJ offences (overall as well as broken down into specific AoJ offence groupings) across all levels of aggregation – that is, across regions, provinces/territories and cities. Second, trends over time in the charging of individuals with AoJ offences vary, sometimes dramatically, across these same levels of aggregation. At least at the city level, analyses further demonstrated that the use of AoJ offences cannot be fully explained by overall crime rates. Rather, despite federal legislation governing criminal law, provincial/territorial – and even city – 'culture' would appear to have its own impact, producing varying levels of 'local' practices with respect to AoJ offences. Further, the notion that AoJ offences constitute a homogeneous group of criminal offences and, by extension, a singular problem (for which there is a single solution) needs to be reassessed. Indeed, the factors driving the use of AoJ offences are likely different across the three types of AoJ offence groupings, as well as across jurisdictions and cities.

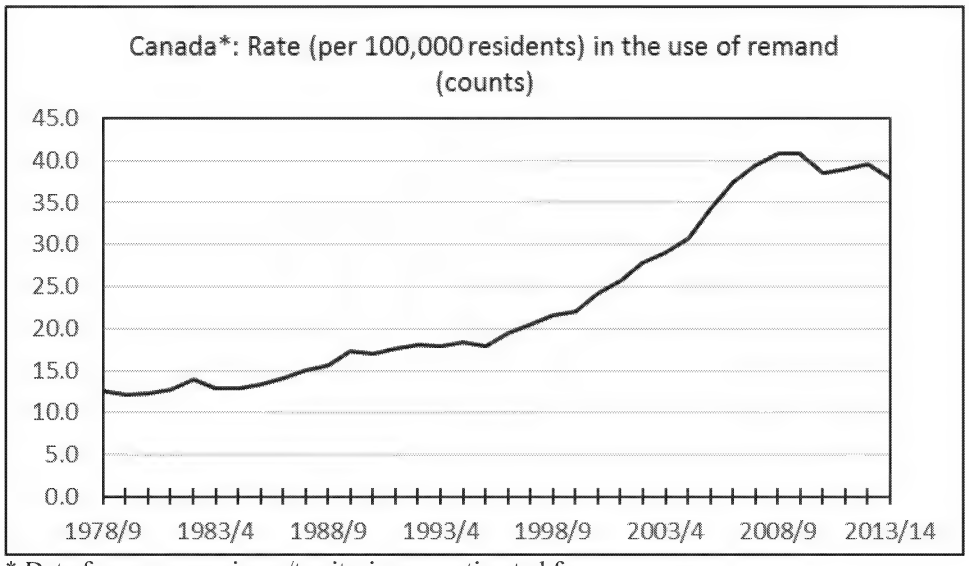
II - The 'Remand Problem'

a) Prevalence of the Problem

Although the 'bail problem' is commonly seen as the primary contributor to the 'remand problem', the logic underlying this causal connection has tended to be very simplistic in nature. Specifically, it is simply assumed that the greater number of accused being brought to bail court has led to a greater number of accused in remand. While likely to be at least a partially correct supposition, it neglects the multi-factorial – and more importantly – interactive (i.e. non-additive) process impacting the remand population. Indeed, very little attention has been given to piecing apart the various factors contributing to the 'remand problem' as well as the complicating element of variability across time and place.

It is well known that the remand population in Canada has increased in recent years. It is, perhaps, less well known that the remand population has, at least in one province (Ontario), levelled off and has started to decline. This one province, being the largest, is, of course, disproportionately responsible for the apparent levelling off of the Canadian remand rate shown in Figure 25. Note that Figure 25 reports remand *counts* – the average number of people in presentence custody in provincial prisons on an average night each year. *Counts* need to be distinguished from *admissions* – the number of people admitted (in an analogous case) to presentence custody in a given year.

Figure 25



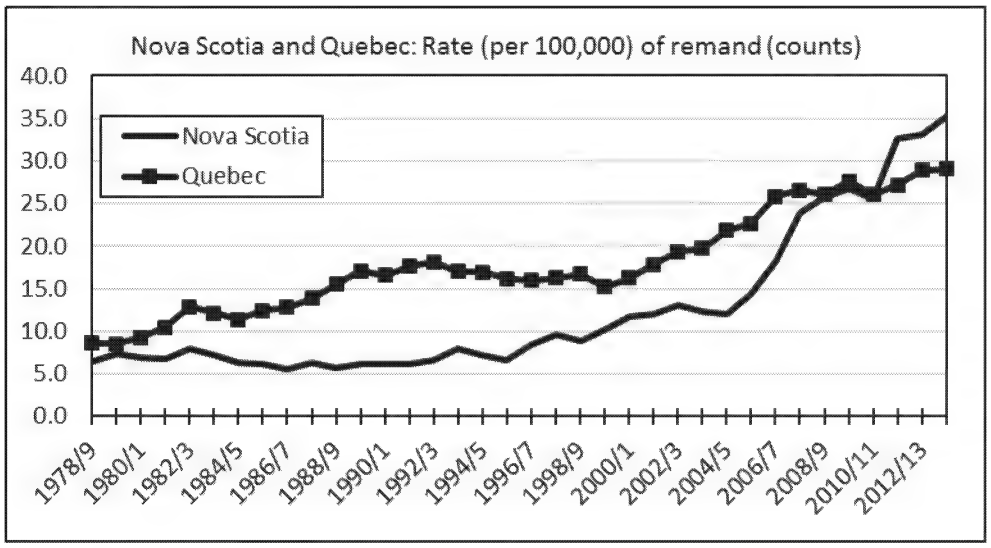
* Data for some provinces/territories are estimated for some years.

b) Inter-Jurisdictional Variability

However, Figure 25 obscures what may be very important differences across provinces/territories on two separate dimensions. On the one hand, it is essential to examine the absolute rate of remand prisoners – that is, the counts of people in prison per 100,000 people in the general population. On the other hand, it is equally valuable to explore patterns of increase over time. Indeed, similar to police charging practices relative to AoJ offences, substantial variability can also be found relative to the 'remand problem' in Canada.

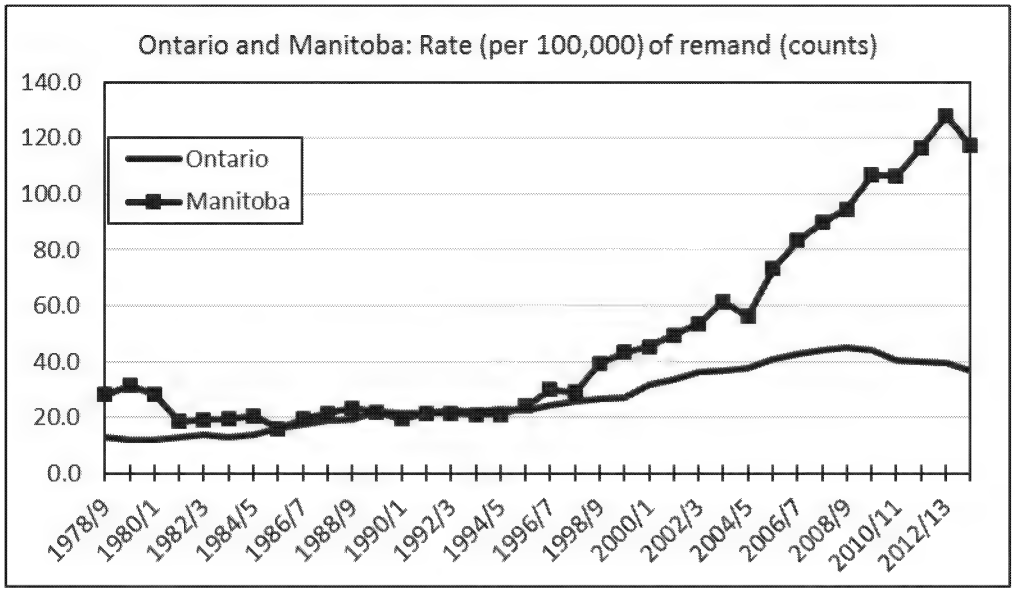
The following three figures – the average number of people in remand per 100,000 in the general population – demonstrate both forms of variation across selected jurisdictions (Figures 26 through 28).

Figure 26



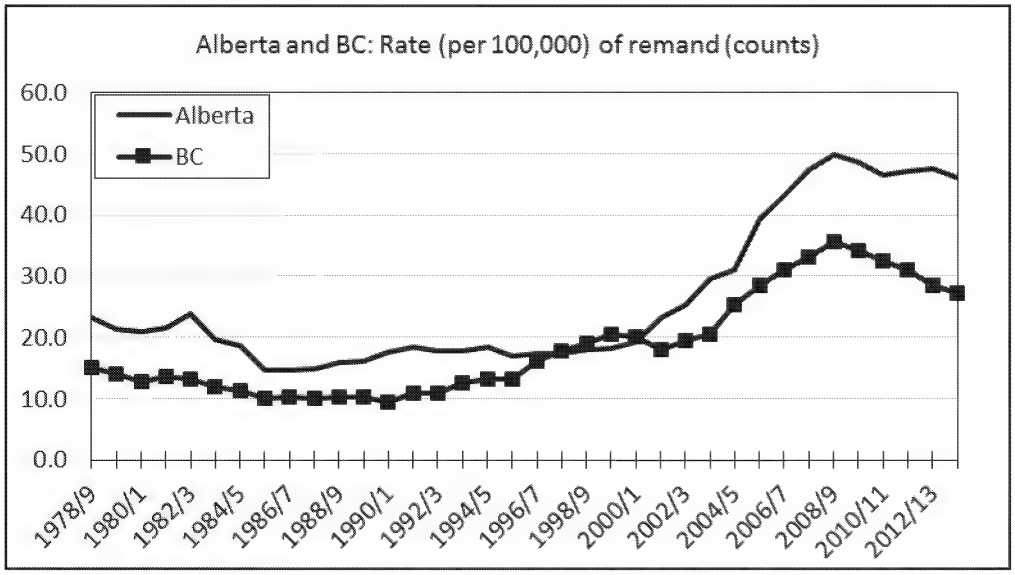
Notably, both Nova Scotia and Quebec had very similar remand rates in the late 1970s. However, while both provinces show an increase in the use of remand over the last 20 years, the shape of their individual trajectories (or curves) is different. For example, while Nova Scotia was able to maintain relative stability between the late 1970s and the mid-1990s, Quebec's remand rate had already started to rise. However, once the remand rate in Nova Scotia began to increase, the rate of increase was especially steep.

Figure 27



The similarity of the remand rates in Ontario and Manitoba until the late 1990s is even more striking. However, in sharp contrast to Ontario whose use of remand rose somewhat and then declined, Manitoba's remand rate witnessed a dramatic increase until very recently. While these two jurisdictions may have had very similar rates of remand for the first 20 years of this graph, their rates are dramatically different in 2014. This figure is particularly interesting in terms of one of the most common explanations sometimes offered for Manitoba's high remand rates – the large Indigenous population in this province. As it seems unlikely that an increase in the proportion of Manitoba's population who are Indigenous peoples could account for the dramatic change which has occurred over the last 4 decades, Figure 27 constitutes an intriguing counter to this argument, or at a minimum, does not appear to be a plausible explanation for the increase since the late 1990s.

Figure 28



Similar conclusions can be drawn by the comparison of Alberta and British Columbia. While Alberta's remand rate was slightly higher than that of British Columbia until the mid-1990s, both showed relative stability. However, although both jurisdictions show an increase since the mid-1990s, the rate of increase in Alberta is considerably higher than that in British Columbia. Since the late 2000s, both jurisdictions have shown a decline in their remand rates, though it appears to have been more pronounced in British Columbia.

Indeed, the common practice of comparing remand rates across jurisdictions for a particular (often the most recent) year clearly masks very different trajectories or trends over time. Specifically, the shapes of the remand curves across provinces vary considerably. In fact, one would be tempted – once again – to suggest that there are very distinct 'local causes' at play within each jurisdiction. While there is a tendency to talk about remand as a single problem, this assumption would appear to be untrue when one sees that the growth in remand rates is considerably different across jurisdictions.

c) Understanding its Various Components

However, even understanding changes in remand rates within one jurisdiction is rendered considerably more complex when one recalls that prison *counts* (i.e., number of people in prison on an average night) are a result of a number of diverse elements. Indeed, when attempting to identify the various 'causes' of the increase in the use of remand generally in Canada, it is necessary to piece apart or disentangle the multiple (and interacting) factors which contribute to the remand population. Most notably, a jurisdiction's remand population is determined by such factors as:

1) crime rate
2) police charging practices
3) number of cases sent to bail court by police (who are increasingly less likely to use their discretion to release)
4) number of cases remanded (reflecting not only the Crown's resistance to consent to release and the consequent need for a bail hearing but also judicial reluctance to release without especially stringent release orders)
5) length of stay in remand

Indeed, we have already partially explored – within the context of AoJ offences – the first two of these contributing elements. Most notably, it was shown that trends in the crime rate and in police charging practices are not necessarily the same. Although the overall crime rate has been falling since the early 1990s in Canada, police charging practices of AoJ offences have been increasing (at least relative to certain groupings of these offences and in certain jurisdictions).

As a further illustration of the complexities involved in understanding the 'bail problem', we have chosen to expand our initial examination of the front end of the criminal court process in an attempt to explain changes in the back end. Specifically, we will incorporate trends in both the crime rate as well as police charging practices into a model which explores the 'remand problem'. In terms of the five factors listed above, the only one which is not included in our examination is the number of cases actually sent to bail court (for a determination of bail). Unfortunately, we do not currently have national data on the number (or proportion) of those people charged in Canada who start off their 'court life' in bail court (as this information is not part of the Integrated Criminal Court Survey of the Canadian Centre for Justice Statistics).

To this end, we opted to use two case studies as the most effective way of exploring this problem. Specifically, we chose Ontario and Manitoba. Having said this, there is no reason to believe that the factors explaining trends in remand (and the various ways in which they interact with each other) in these two jurisdictions would be the same for other jurisdictions in Canada. Equally notable, while it would have been arguably more interesting to focus these case studies on AoJ offences (as a continuation of the initial analyses already conducted), the CANSIM data do not make available any offence fields within the scope of the correctional data.

Case Study I: Ontario

There are many measures of crime rates. Column A in Table 5 shows that overall crime went down during this period in Ontario. However, Column B demonstrates that the police increased their charging rate during this period from approximately 22 adults charged per 100 crime incidents to 30. Until about 2010, the increase in the police charge rate meant that the number of adults actually charged (Column E) did not decrease during a period when crime was decreasing. It is only in the last few years that the number of adults actually charged decreased.

Remand *admissions* first went up and then, starting in 2009, decreased somewhat (Column C) in Ontario. Remand admissions per 100 adults charged (Column D) went up a bit and then down, ending up at about the same rate at which it started. As a separate measure of the 'remand problem', the year 2009 also constituted the beginning of a slow decline in the size of the Ontario remand population *counts* (Column F). Using 2009 as a reference point, we looked at the change from 2009 to 2014 (second last row in the table). It would be tempting to say that the recent reduction in the remand counts (-15%) in Ontario (Column F) is due to the reduction in the number of adults charged (-12%) by the police (Column E), notwithstanding the fact that they are charging at a higher rate than they were earlier (Column B).

Table 5: Understanding Remand Counts (Ontario)

Ontario: Crime and Remand						
Year	**(A)** Crime incidents reported to police per 100K residents	**(B)** Adults charged per 100 crime incidents reported	**(C)** Remand admissions (number)	**(D)** Remand admissions per 100 adults charged	**(E)** Number of adults charged	**(F)** Remand Counts
2000	7,061.70	22.15	52,179	28.54	182,819	3,700.0
2001	6,813.04	22.83	56,370	30.46	185,083	3,999.0
2002	6,610.87	23.52	58,470	31.10	187,983	4,373.0
2003	6,374.03	22.21	56,423	32.56	173,303	4,490.3
2004	6,034.55	24.50	58,006	31.66	183,227	4,669.9
2005	5,826.25	25.86	61,965	32.82	188,784	5,125.3
2006	5,970.87	25.69	65,564	33.76	194,206	5,414.8
2007	5,695.58	26.55	66,558	34.48	193,028	5,616.2
2008	5,478.04	27.76	65,041	33.21	195,876	5,808.6
2009	**5,310.02**	**27.76**	**62,669**	**32.70**	**191,628**	**5,718.1**
2010	5,073.39	28.55	58,862	30.94	190,237	5,341.3
2011	4,796.40	28.93	56,302	30.59	184,060	5,305.3
2012	4,612.10	29.53	52,744	28.88	182,609	5,309.3
2013	4,183.71	30.86	48,328	27.63	174,943	5,005.7
2014	4,025.49	30.67	46,259	27.39	168,907	4,862.0
Change: 2009 to 2014	-24%	+10%	-26%	-16%	-12%	-15%
Change 2000 to 2009	-25%	+25%	+20%	+15%	+5%	+55%

However, there is one peculiar finding in need of explanation. Specifically, there is an even larger decrease from 2009 to 2014 (-26%) in the number of remand *admissions* (Column C) than the reduction in remand *counts* (Column F: -15%). This larger decrease in admissions to remand than in counts could occur in the case that the bail courts were sending fewer people into remand (either because the police themselves released more accused and, by extension, they never appeared in bail court or because of changes in the decisions made in bail court whereby release decisions were taken before the accused was ever sent to a remand facility).

A quick examination of prior years is necessary to understand this 'discrepancy'. The highest crime rate during this 14-year period was in the year 2000 (Column A). The number of adults charged (Column E) increased by 5% between 2000 and 2009 (the last row in the table), in large part because the police were more likely to charge than they had earlier (Column B). Remand admissions – expressed as a simple number (Column C) or as a rate (Column D) – went up somewhat (+20% and +15% respectively). But what went up dramatically between 2000 and 2009 (+55%) was the remand counts (Column F).

Putting these two findings together, we see that remand *counts* seem to increase faster and decrease slower than one would expect on the basis of these other logically related indicators. To identify how this can be, it is important to remember a truism about 'counts' in prison. Specifically, prison counts are driven much more by long stays in prison than they are by short stays. And equally important, l*ong stays in remand, one might suggest, are driven by court delay* (rather than bail issues, per se).

To illustrate the uneven impact of long and short stay prisoners, simply imagine that 810 people are admitted to prison in one year. Imagine further that 730 of them spend, on average, 5 days in custody and after they make it through the bail process, they are released. If these 730 prisoners are spread out evenly across the year, the provincial/territorial correctional system will need only 10 beds for them. One bed will accommodate a person for 5 days. In one year, 73 different people can sleep in that bed without having to share it.

In addition, assume that there are 80 people who are denied bail and spend an average of 9 months awaiting trial. They will need 60 beds to house them during that year since each one is occupying a bed for ¾ of a year. So 10% of the prisoners – 80 of the 810 prisoners – use 86% (60/70) of the beds. Said differently, it is the long stay prisoners who disproportionately account for the remand (count) rate.

So one might ask what this reality has to do with trying to figure out how the changes in remand *admissions* in Ontario do not line up with changes in remand *counts* (on an average night). In search of this answer, we then looked at the data on the length of stay of those released from remand in Ontario in recent years. These data are presented in Tables 6 (numbers) and Table 7 (proportions).

Table 6

Time spent in remand before release – **Ontario**							
Year	Total Remand releases	Releases within 1 month	Greater than 1 month to 3 months	Greater than 3 months to 6 months	Greater than 6 months to 12 months	Greater than 12 to less than 24 months	24 months or more
2000/1	51,642	40,375	7,418	2,632	940	241	36
2001/2	56,356	44,070	8,201	2,711	962	298	114
2002/3	58,331	45,010	8,746	3,048	1,074	337	116
2003/4	56,331	44,200	8,099	2,780	916	269	67
2004/5	57,481	44,853	8,406	2,884	939	298	101
2005/6	61,756	47,715	9,365	3,181	1,048	333	114
2006/7	65,211	50,271	10,028	3,265	1,126	405	116
2007/8	66,042	51,197	9,833	3,304	1,129	440	139
2008/9	65,290	50,149	9,995	3,249	1,251	484	162
2009/10	62,799	48,454	9,330	3,090	1,257	496	172
2010/11	59,185	46,474	7,772	3,016	1,222	517	184
2011/12	56,162	44,258	7,347	2,718	1,154	498	187
2012/13	52,688	41,099	7,022	2,649	1,218	502	198
2013/14	48,924	37,851	6,559	2,488	1,216	574	236
2014/15	46,314	35,440	6,612	2,385	1,117	512	248

*Releases with unknown release times have been removed

Looking at Table 6 (above), one can see that the number of long stay prisoners (staying 6 months or more) increased. The increases are most evident for those spending more than one year in remand custody. In numbers, the increase does not look dramatic. However, one needs to remember that in terms of "person-years", these are very large increases. Indeed, there are 200 more people who spent at least 2 years in remand in 2013/14 than there were in 2000/1. Since each of these people uses up two 'bed-years', it means that this increase alone accounts for a need for 400 more remand beds.

But there are substantial decreases in the number of short stay remand prisoners. In 2009/10, there were 57,784 (46,454 + 9,330) prisoners who stayed for 3 months or less. In 2013/14 (4 years later), this number had decreased to 44,410 (37,851 + 6,559) - a reduction of roughly 23%. Clearly, there was a savings from this decrease of 13,374 'short stay' prisoners. But if these were very short stay prisoners – *hypothetically* they stayed only about 10 days on average – this would reduce the need for remand spaces by only about 366 beds (13,374 x 10/365 = 366.4).

In other words, the reduction in both adults charged and remand admissions did, indeed, reduce the size of the remand population somewhat. However, the courts (very likely through lengthy case processing times) kept a relatively small number of these remand admissions in remand custody longer. As a result, these long-stay accused dampened the reduction in the remand population in Ontario's prisons. Table 7 shows the proportions of those released at various times.

Table 7

Time spent in remand before release **Ontario**				
	Total Remand releases	Releases within 1 month	Greater than 1 month to 6 months	Greater than 6 months
2000/1	100%	78%	19%	2.4% (N=1,217)
2001/2	100%	78%	19%	2.4% (N=1,374)
2002/3	100%	77%	20%	2.6% (N=1,527)
2003/4	100%	78%	19%	2.2% (N=1,252)
2004/5	100%	78%	20%	2.3% (N=1,338)
2005/6	100%	77%	20%	2.4% (N=1,495)
2006/7	100%	77%	20%	2.5% (N=1,647)
2007/8	100%	78%	20%	2.6% (N=1,708)
2008/9	100%	77%	20%	2.9% (N=1,897)
2009/10	100%	77%	20%	3.1% (N=1,925)
2010/11	100%	79%	18%	3.2% (N=1,923)
2011/12	100%	79%	18%	3.3% (N=1,839)
2012/13	100%	78%	18%	3.6% (N=1,918)
2013/14	100%	77%	18%	4.1% (N=2,026)
2014/15	100%	77%	19%	4.1% (N=1,877)

*Releases with unknown release times have been removed

Indeed, Ontario was successful in being able to reduce the number of people remanded to prison. However, this 'improvement' was reduced somewhat by what would appear to be problems associated with court delay in Ontario. In other words, the notion that a single 'solution' will resolve the overall problem is likely naïve. As decisions are being made at each point in the criminal process, intervention is likely required on a number of different fronts, with a number of different criminal justice actors and likely through a number of different strategies.

Case Study II: Manitoba

The second case study – Manitoba – is explored in Table 8 below.

Table 8: Understanding Remand Counts (Manitoba)

Manitoba: Crime and Remand						
	(A) Crime incidents reported to police per 100K	**(B)** Adults charged per 100 crime incidents reported	**(C)** Remand admissions (number)	**(D)** Remand admissions per 100 adults charged	**(E)** Number of adults charged	**(F)** Remand counts
2000	11,713.63	20.88	6,955	24.79	28,059	520.0
2001	12,312.25	20.77	7,625	25.89	29,449	570.0
2002	12,254.75	20.81	8,615	29.21	29,497	620.0
2003	13,451.40	19.26	8,273	27.44	30,145	715.0
2004	13,630.00	18.43	8,390	28.46	29,484	659.4
2005	12,576.24	16.31	9,816	40.62	24,165	863.0
2006	12,323.11	16.84	9,479	38.59	24,566	986.3
2007	11,699.09	18.33	9,643	37.81	25,506	1,067.1
2008	10,702.60	19.98	9,782	38.20	25,610	1,132.6
2009	11,358.95	19.59	10,836	40.29	26,893	1,289.3
2010	10,649.83	21.78	11,380	40.19	28,314	1,298.2
2011	9,865.95	22.96	12,423	44.45	27,949	1,434.6
2012	9,741.31	24.40	13,351	44.93	29,717	1,600.9
2013	8,721.40	25.23	13,123	47.13	27,847	1,482.1
2014	8,353.23	24.52	12,717	48.42	26,264	1,542.0
Change from 2000 to 2014	-29%	+17%	+83%	+95%	-6%	+197%

In Manitoba, we see a decreasing crime rate starting in approximately 2005. As well, the number of adults charged per 100 crime incidents did not begin increasing until roughly 2010. However, remand admissions grew relatively slowly until 2008 after which the number increased quite quickly. Remand counts (as we have already seen in Figure 27) increased substantially throughout this period. On the surface, then, it would seem that the number of remand admissions accounts for some of the increase in counts, but probably not all of it.

This suspicion is confirmed by the data in Tables 9 (numbers) and 10 (proportions). That is, the 'remand problem' in Manitoba is not driven entirely by an increase in the number (and rate) at which accused are admitted to remand. Rather, the length of time that they spend in remand also emerges as a contributing factor.

Table 9

Time spent in remand before release – **Manitoba**							
Year	Total Remand releases	Releases within 1 month	Greater than 1 month to 3 months	Greater than 3 months to 6 months	Greater than 6 months to 12 months	Greater than 12 to less than 24 months	24 months or more
2000/1	7,508	5,717	1,172	462	122	32	3
2001/2	8,817	6,748	1,381	520	136	28	4
2002/3	8,680	6,650	1,284	532	178	31	5
2003/4	9,239	6,915	1,419	600	255	45	5
2004/5	8,470	6,381	1,239	536	232	68	14
2005/6	9,811	7,062	1,684	713	257	83	12
2006/7	8,972	6,001	1,688	870	297	93	23
2007/8	9,200	6,051	1,684	951	373	126	15
2008/9	9,339	6,165	1,637	935	452	126	24
2009/10	10,365	6,914	1,666	1,062	518	169	36
2010/11	11,117	7,537	1,721	1,076	571	177	35
2011/12	11,906	8,210	1,817	1,101	545	192	41
2012/13	13,084	8,776	2,076	1,316	660	213	43
2013/14	13,109	8,835	2,138	1,221	652	222	41
2014/15	12,708	8,577	1,985	1,232	654	227	33

*Releases with unknown release times have been removed

Indeed, we see – once again – that the number of those who leave remand status (either by leaving prison altogether or by shifting from being on remand to being sentenced prisoners) after spending six months or more on remand increased substantially. Indeed, the number of those in remand for 6-12 months rose more than fivefold over this 14-year period. The same phenomenon is demonstrated in terms of the proportion of remand prisoners who spent more than six months in remand. In particular, this percentage increased substantially between 2000/1 and 2007/8. Thereafter, the number (and proportion) continued to increase because of the increase in remand admissions until 2012 (see Table 8).

In contrast with Ontario (in which the growth in its remand population is due largely to longer stays in remand, once admitted), Manitoba's dramatic growth appears to be due to two factors: increased admissions and increased length of stay in remand once admitted. Indeed, not only has the number and rate of admissions per 100 adults charged been increasing, but there has been a shift in the time spent in remand (whereby a lower proportion of remand prisoners are being released within 1 month and a higher proportion are released after at least 6 months).

Table 10

Time spent in remand before release **Manitoba**				
	Total Remand releases	Releases within 1 month	Greater than 1 month to 6 months	Greater than 6 months
2000/1	100%	76%	22%	2.1% (N=157)
2001/2	100%	77%	22%	1.9% (N=168)
2002/3	100%	77%	21%	2.5% (N=214)
2003/4	100%	75%	22%	3.3% (N=305)
2004/5	100%	75%	21%	3.7% (N=314)
2005/6	100%	72%	24%	3.6% (N=352)
2006/7	100%	67%	29%	4.6% (N=413)
2007/8	100%	66%	29%	5.6% (N=514)
2008/9	100%	66%	28%	6.4% (N=602)
2009/10	100%	67%	26%	7.0% (N=723)
2010/11	100%	68%	25%	7.0% (N=783)
2011/12	100%	69%	25%	6.5% (N=778)
2012/13	100%	67%	26%	7.0% (N=916)
2013/14	100%	67%	26%	7.0% (N=915)
2014/15	100%	67%	25%	7.2% (N=914)

*Releases with unknown release times have been removed

In brief, the notion that there is a single 'remand problem' in Canada may also need to be revised. Indeed, its size and pattern of growth vary substantially across jurisdictions. More broadly, given that the law governing bail (and the prosecution of cases, more generally) is the same across the country, the data do not appear to be consistent with the view that the 'remand problem' relates directly to identifiable changes in the law. Indeed, if the growth in remand were due to changes in the law, one would expect that the changes in the remand populations would follow similar patterns across time. This does not appear to be the case. Rather, we find ourselves – once again – suggesting that such variability may reflect – at least in part – more 'local' explanatory factors.

Although we have only looked at two provinces in detail, it would appear – at least for Ontario and Manitoba – that the growth in remand occurred for two separate, yet identifiable – reasons. On the one hand, increases in the number of people entering the provinces' prisons as remand prisoners is seemingly a contributing factor. On the other hand, and quite separately, increases in the number (and proportion) of people who spend long times in remand (e.g., greater than 6 months) appears to also be a source of the problem. However, it is equally likely that there will be variability across jurisdictions even in terms of these two issues (and, by extension, potential strategies of intervention). Indeed, as we have just observed, although Ontario has been generally successful in

reducing the number of accused admitted to remand (likely rooted, at least in part, in such initiatives as Justice on Target), the proportion of those (smaller number) in remand are staying longer (likely due to court delay in resolving criminal cases generally). Manitoba – on the other hand – not only has increased – rather than decreased – the number of accused admitted to remand (potentially due, in part, to increased police charging, the number of cases starting their case processing lives in bail court and/or delays in getting a determination of bail) but the proportion of those (greater number) in remand are also staying longer (likely also due to wider issues of court delay). Even given the overlap in court delay issues, increases in time (and likely also number of appearances) to process criminal cases that involve accused who spend time in remand will potentially depend on the kinds of cases found in each jurisdiction.

d) Exploring Consistency over Time

Readers of this report do not need us to tell them that Indigenous peoples are over-represented in Canada's prisons/penitentiaries. This has been known, on a statistical basis, for 50 years.[5] Similarly, we also know that the overall remand population in Canada is considered to be high and, at least until very recently, has been increasing.

As we have already argued, what may be less well known is that the pattern of growth of the remand population across Canadian provinces/territories varies considerably in its shape. What does not vary, however, is the fact that the proportion of those admitted into provincial correctional facilities who are Indigenous is not only much higher than their proportion in the population of each province, but that the proportion of those admitted to remand who are Indigenous is *increasing*.

In order to examine the possible over-representation of Indigenous peoples among remand admissions, we needed to get estimates of the size of the Indigenous population in each jurisdiction. Assessing the size of the Indigenous population is a challenge for Statistics Canada at the best of times, for reasons that we do not need to discuss in this report. However, getting a measure of *change* over time in the "proportion of the population who are Indigenous" was made impossible by the previous government's decision to substitute a voluntary household survey for the long form census. Though we looked at both – the 2006 Census and the 2011 Household Survey (see Table 11) – the differences in the measurement systems that were used make it impossible to assess the meaningfulness of any apparent change in the proportion of Indigenous peoples in a given jurisdiction. Simply put, we do not know if changes (or stability) reflect the change in the methodology or stability or changes in the actual percent who are Indigenous. Nevertheless, the data are presented so that the "% Indigenous" graphs below can be interpreted.

[5] Briggs, Jacqueline (3 April 2016). "Shameful anniversary should spur action on Aboriginal justice crisis." *Toronto Star.* http://www.thestar.com/opinion/commentary/2016/04/03/shameful-anniversary-should-spur-action-on-aboriginal-justice-crisis.html

Table 11

Estimates of the Proportion of the Population that is Indigenous and the Proportion of Remand Admissions that are identified as Indigenous peoples (selected years)					
	Population - estimated % Indigenous		**Remand Admissions: % Indigenous**		
	2006 Census	2011 Household survey	2006/7	2011/12	2013/14
Canada	3.8%	4.3%	19.6%	25.1%	24.2%
Newfoundland and Labrador	4.7%	7.1%	29.0%	23.3%	30.3%
Prince Edward Island	1.3%	1.6%	n/a	1.7%	6.0%
Nova Scotia	2.7%	3.7%	8.6%	12.7%	12.7%
New Brunswick	2.5%	3.1%	10.7%	8.6%	10.5%
Quebec	1.5%	1.8%	3.5%	5.3%	5.2%
Ontario	2.0%	2.4%	9.1%	12.7%	13.3%
Manitoba	15.5%	16.7%	64.9%	72.3%	77.7%
Saskatchewan	14.9%	15.6%	78.9%	77.0%	76.1%
Alberta	5.8%	6.2%	34.9%	40.8%	n/a
British Columbia	4.8%	5.4%	20.3%	28.0%	29.7%
Yukon	25.1%	23.1%	74.7%	68.8%	73.3%
Northwest Territories	50.3%	51.9%	89.7%	90.3%	89.8%
Nunavut	85.0%	86.3%	99.9%	99.9%	99.6%

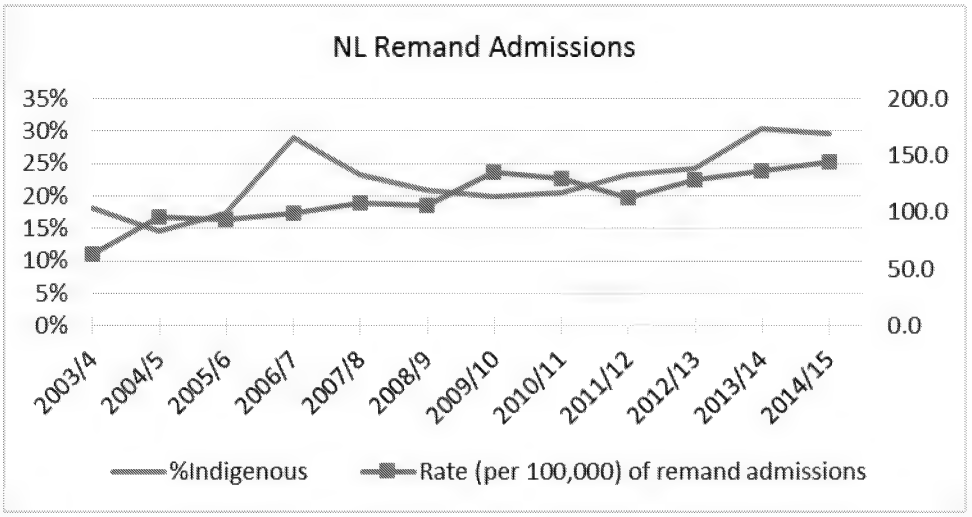
*Those whose identity is unknown have been removed from the calculations.

All population estimates are problematic according to Statistics Canada.

Figures 29 through 41 show the trends in the proportion of admissions that involve Indigenous accused persons and the trends in remand admission rates (overall) across jurisdictions. In all figures, the right side of the graph show the proportion of admissions that involve Indigenous accused people and the left side of the graph show the rate (per 100,000) of (total remand) admissions.

In Newfoundland and Labrador (Figure 29), both the overall remand admission rate and the proportion of admissions that involved Indigenous accused increased throughout the time for which we have data. One might have assumed that the proportion of admissions that involve Indigenous accused would have been stable since admissions generally, were increasing. However, it appears that the increase in admissions, at least since 2009/10, has been concentrated among Indigenous accused persons. For example, the number of non-Indigenous accused admitted in 2009/10 was 559 and the number of Indigenous accused was 139. In 2014/15, the number of non-Indigenous accused admissions into remand was down slightly to 538 but the number of Indigenous remand admissions had increased to 226.

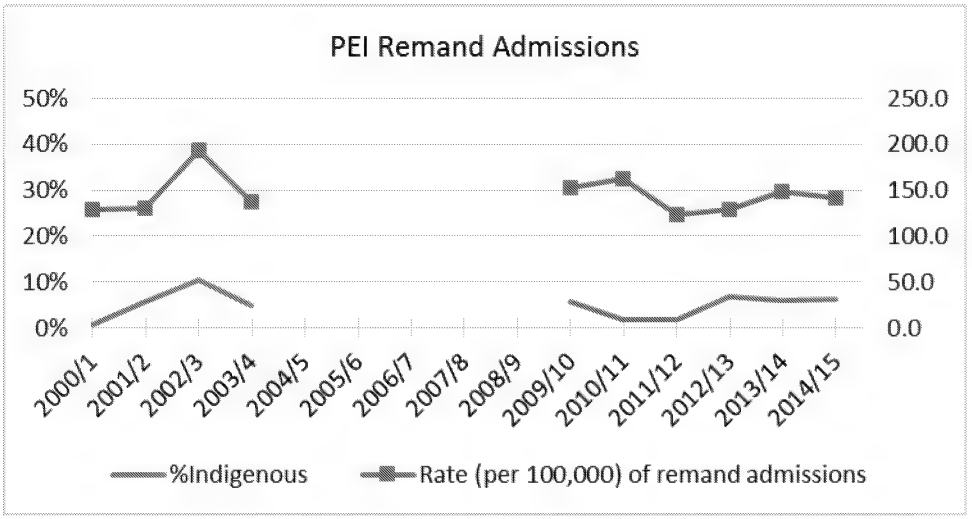
Figure 29



Note: Indigenous peoples constitute 4.7% of the population (2006 long form census)

Missing data constitute an obvious problem in interpreting trends in Prince Edward Island over time (Figure 30). What might be hesitantly concluded is that the rate of remand admissions generally appears to have remained relatively stable. While the proportion of admissions that involve Indigenous accused persons is low in this province, it seemingly also shows relative stability.

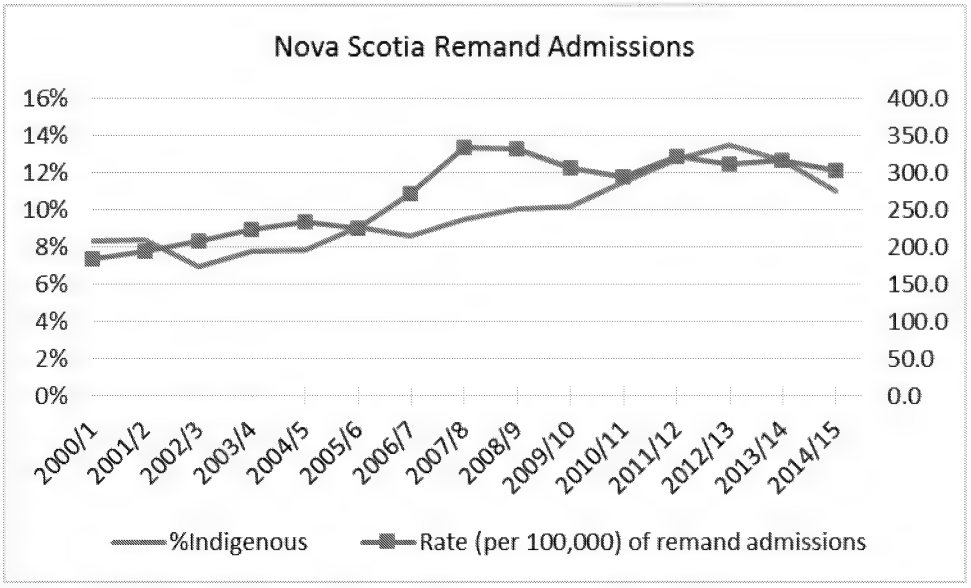
Figure 30



Note: Indigenous peoples constitute 1.3% of the population (2006 long form census)

In Nova Scotia (Figure 31), the remand admission rate started increasing rather substantially in 2005/6 and then decreased slightly to remain relatively stable over the last few years. However, the proportion of Indigenous remand admissions continued to steadily increase and has only started to decline in the most recent years. Unlike Newfoundland and Labrador, Indigenous admissions in Nova Scotia have declined slightly but the proportion is still higher than it was at the beginning of this century.

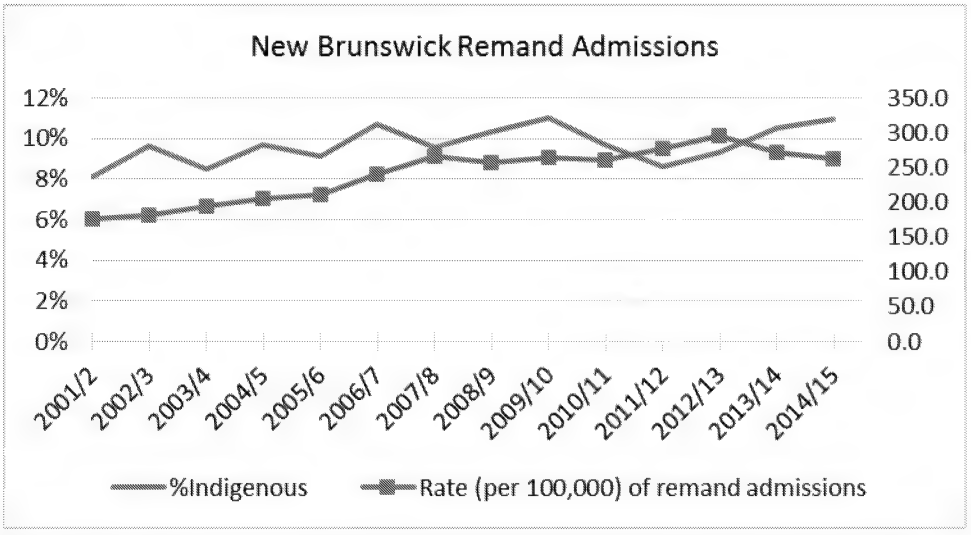
Figure 31



Note: Indigenous peoples constitute 2.7% of the population (2006 long form census)

Remand admissions increased in New Brunswick (Figure 32) during this period until roughly 2012/13 at which time it dropped. However, the proportion of remand admissions who were Indigenous varied from year to year, but ended the period somewhat higher than it was in 2001/2.

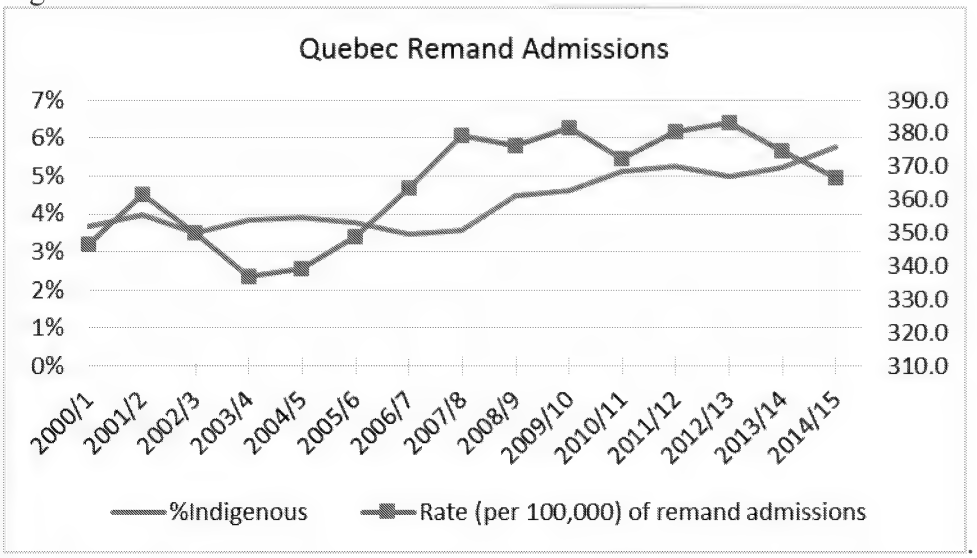
Figure 32



Note: Indigenous peoples constitute 2.5% of the population (2006 long form census)

In Quebec (Figure 33), the rate of remand admissions overall increased substantially between 2003/4 and 2007/8 and was relatively stable until 2012/13 when it began decreasing. In contrast, the proportion of these remand admissions who were Indigenous peoples began drifting upwards in roughly 2007/8, continuing until 2014-15. Similar to NL, Quebec has seen recent reductions in admissions for non-Indigenous accused persons (from 29,439 in 2012/13, down to 28,367 in 2014/15) but increases for Indigenous peoples (from 1,550 in 2012/13 to 1,739 in 2014/15).

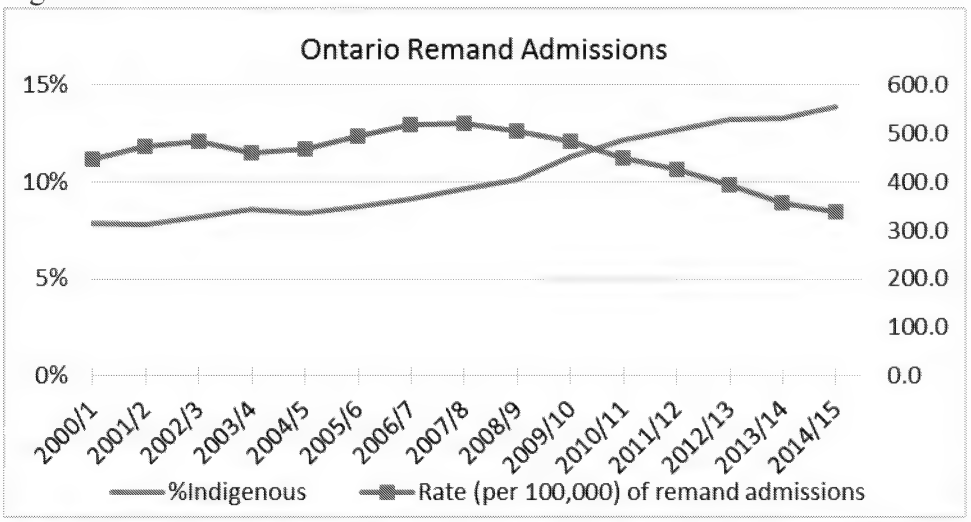
Figure 33



Note: Indigenous peoples constitute 1.5% of the population (2006 long form census)

In Ontario (Figure 34), while the overall remand admission rate started to decline in 2008-2009, the percent Indigenous remand admissions continued to increase. Notably though, while both Indigenous and non-Indigenous admissions have decreased, Indigenous admissions were slower to decline.

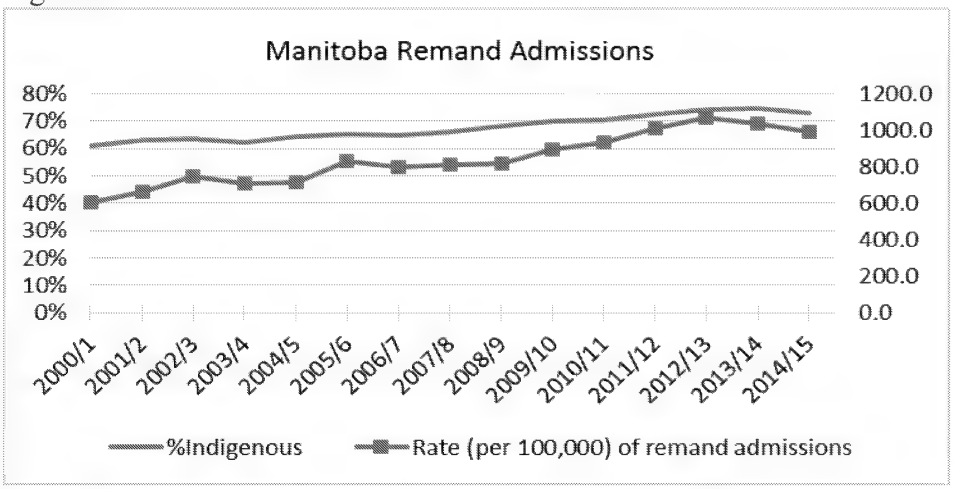
Figure 34



Note: Indigenous peoples constitute 2.0% of the population (2006 long form census)

With Manitoba (Figure 35), the general increase in the proportion of remand admissions who were Indigenous peoples appears to be due to relative stability in the number of non-Indigenous people admitted, coupled with an increase in the number of Indigenous remand prisoners. For example, from 2001/2 to 2013/14, the number of non-Indigenous accused admitted went from 3,265 to 3,335 whereas the number of Indigenous admissions went from 6,378 to 9,788.

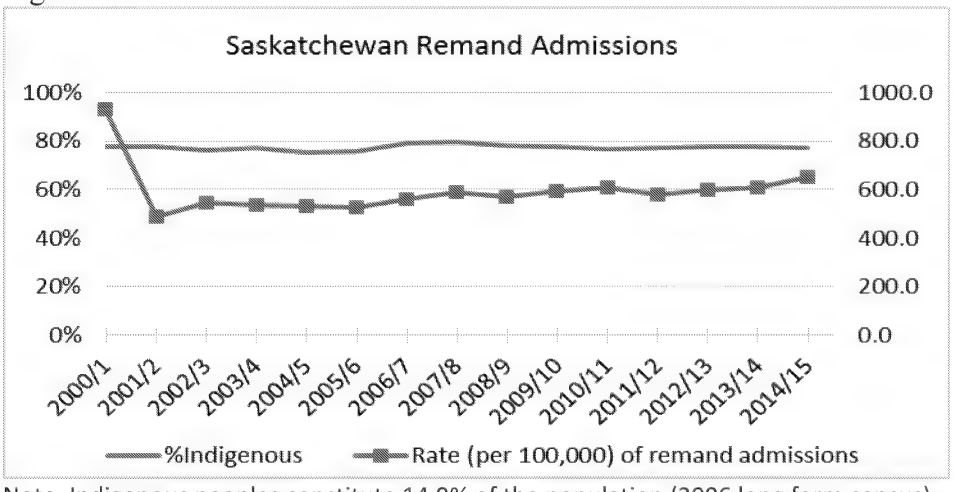
Figure 35



Note: Indigenous peoples constitute 15.5% of the population (2006 long form census)

In Saskatchewan (Figure 36), there have been slight increases in the overall remand admission rate (from the low 500s per 100,000 in the early 2000s to 650 in 2014/15). However, both Indigenous and non-Indigenous admissions appear to be similarly increasing. In other words, though the percentage of Indigenous remand admissions (roughly 75-80%) was always dramatically higher than the estimated proportion of Indigenous peoples in the province (estimated as roughly 15%), there was no change in this proportion during this century.

Figure 36[6]

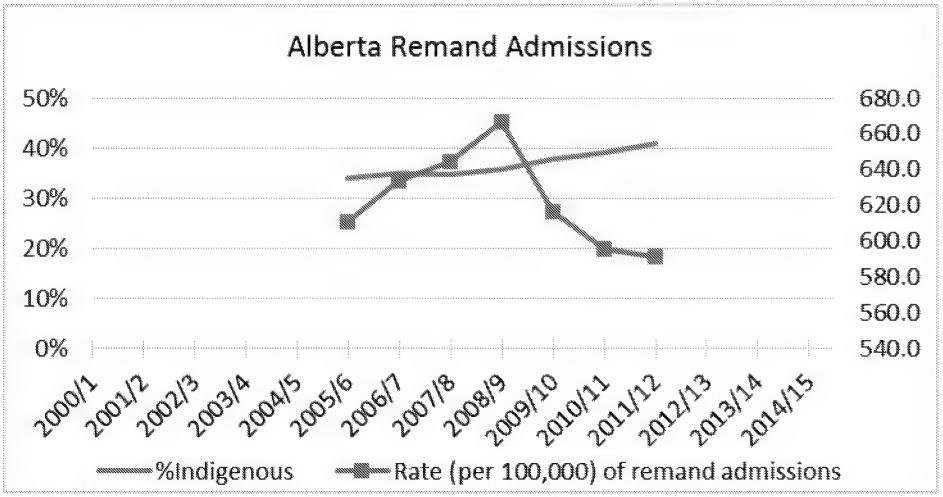


Note: Indigenous peoples constitute 14.9% of the population (2006 long form census)

[6] We have no explanation for the apparently anomalous overall rate for 2000/1. In the absence of an explanation, we would suggest that this data point might be ignored.

Another variation on the same theme as QC and NL is found in Alberta (Figure 37). While the overall remand admission rate has declined since 2008/9, the proportion of Indigenous accused admitted to remand increased. The number of non-Indigenous admissions went from 13,404 in 2005/6 up to a high of 15,369 in 2008/9 and then came back down to 13,269 in 2011/12. In contrast, Indigenous admissions increased over the entire time period, going from 6,877 in 2005/6 to 9,137 in 2011/12.

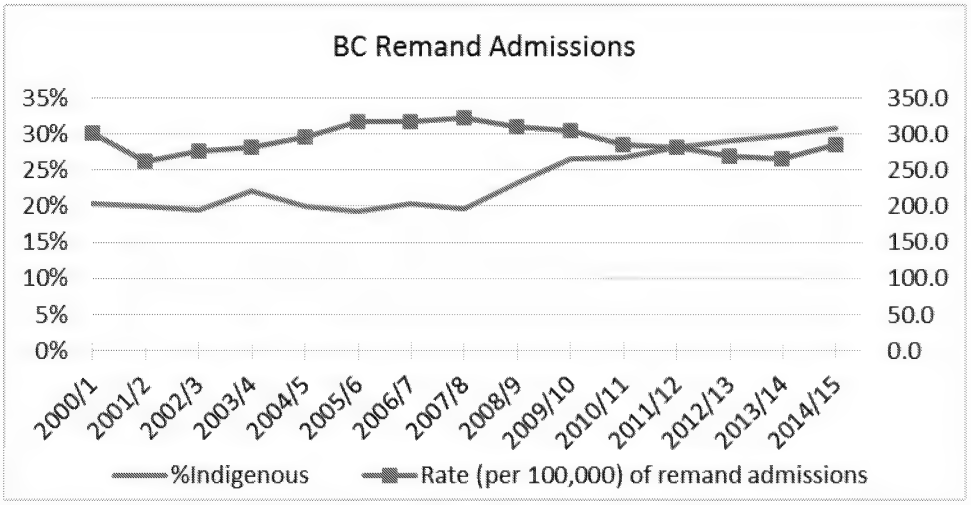
Figure 37



Note: Correctional admission data are not generally available for Alberta.
Indigenous peoples constitute 5.8% of the population (2006 long form census).

In British Columbia (Figure 38), the remand admission rate started decreasing around 2008/9. However, the percent Indigenous peoples among remand admissions was level at approximately 20% during the first years of this century, but then started to increase around 2007/8. Admissions for non-Indigenous accused went from 11,121 in 2007/8 down to 8,537 in 2013/14 (and then increased to 9,765 most recently). In contrast, Indigenous remand admissions increased from 2,725 in 2007/8 to 3,601 in 2013/14 (and most recently went up again to 4,084).

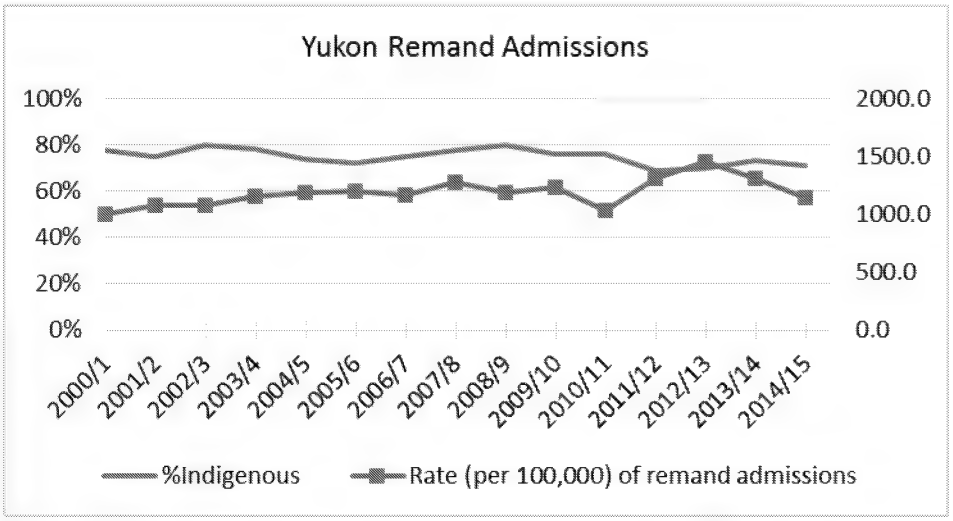
Figure 38



Note: Indigenous peoples constitute 4.8% of the population (2006 long form census)

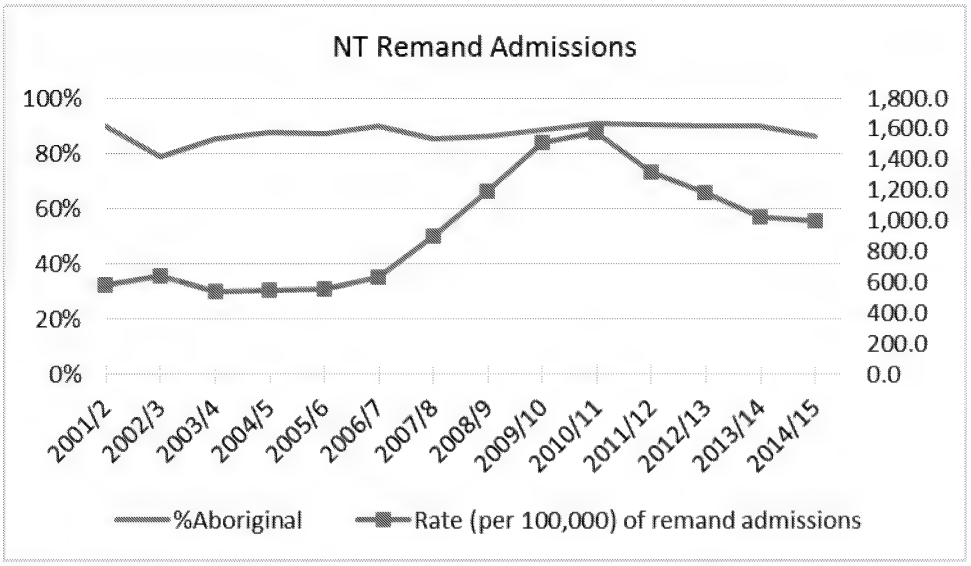
The three territories show similar – relatively stable – proportions of remand prisoners who were Indigenous accused. However, the overall remand admissions rates in the three territories vary.

Figure 39



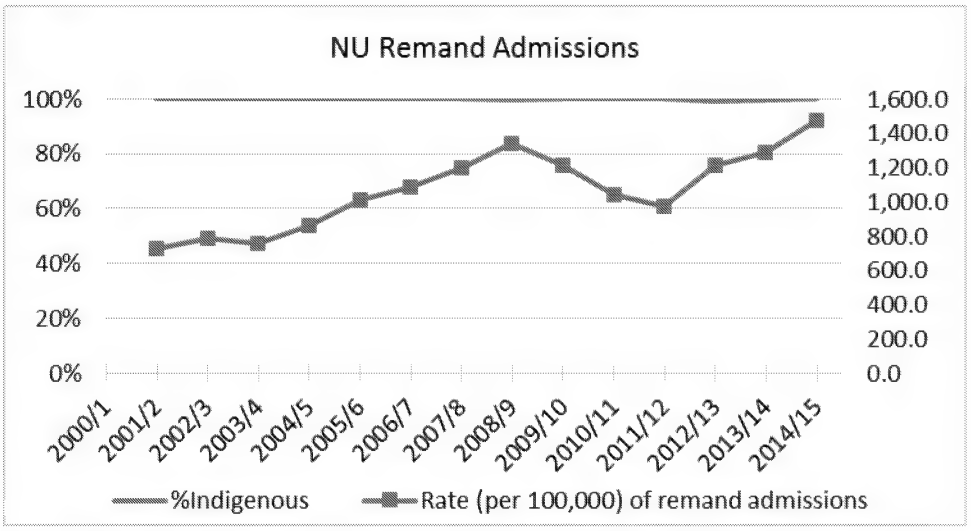
Note: Indigenous peoples constitute 25.1% of the population (2006 long form census)

Figure 40



Note: Indigenous peoples constitute 50.3% of the population (2006 long form census)

Figure 41



Note: Indigenous peoples constitute 85.0% of the population (2006 long form census)

In brief, it would seem that regardless of the shape of the changes in the overall remand admission rates in a province/territory, the growth in the proportion of those admitted to remand who are Indigenous peoples is simple to describe. Specifically, it is generally going up. More importantly, it is generally going up (as a proportion of remand admissions that are Indigenous) even though the shape of the growth in the remand admission rates varies somewhat across time (i.e. increasing, decreasing or remaining relatively stable). Note that there is no obvious reason for the *proportion* of Indigenous peoples in remand admissions to increase. One might have expected that this already over-represented group would simply remain as a constant portion of the remand admissions. This does not appear to have been the case. Rather, not only are Indigenous peoples admitted into remand custody at a rate that exceeds dramatically their representation in the general population, but this proportion is generally increasing in most jurisdictions. Potentially if we were to focus some attention on understanding the reasons for the over-representation (and often growing over-representation) of Indigenous people in remand admissions, we might be able to understand and address not only this issue, but also the changes in remand admissions more generally.

III – International Perspectives

Notably, while many nations are experiencing elevated rates of pre-trial detention (including most Western developed countries[7]), there has been limited scholarly attention given to the effectiveness of particular bail provisions in limiting this increasingly global concern. This lack of evaluation is particularly disconcerting when examining bail laws in other nations. As criminologists and legal scholars have known for decades, the sociological dichotomy between 'laws in books' and 'laws in practice' warns us that what the bail laws mandate and what actually happens in practice are often not the same. Within this context, Canada provides a valuable lesson.

[7] For instance, see Schönteich (2014) and Walmsley (2008).

As this report has repeatedly noted, despite national legislation governing bail, substantial variability exists across regions, jurisdictions and even cities in terms of the policies and practices actually being followed.

With these concerns in mind, our primary objective was to locate (methodologically strong) evaluation studies of legislative changes to the bail laws in other countries as a window into their actual impact. Unfortunately, our search turned up very little. Specifically, we could only find two evaluations related directly to bail policy. As a (less desirable) alternative, we consulted a number of government and non-governmental reports which tended to simply describe bail laws or practices in other nations (sometimes within a 'best practices' approach) which either currently exist or have been proposed as potential strategies to reduce rates of pre-trial detention. While our focus was predominantly on comparable nations to Canada, we also considered other countries for which information as available.

Most Western developed nations (for which we could find information) have bail processes similar to Canada, with a number of limited grounds for detention which are codified in law. Some scholars and organizations[8] have advocated for countries to limit the types of offences for which pre-trial detention is a possibility. Indeed, several countries already prohibit the use of pretrial detention for offences not punishable by incarceration (e.g., New South Wales, Australia; Bolivia; Mexico; Serbia) while others ban pre-trial detention for offences for which the maximum sentence is a certain number of years imprisonment or fewer (e.g., one year imprisonment for Lithuania, Poland and Turkey, two years for Russia, four years for Romania). Underlying these 'right to release' offences is the rationale that an individual awaiting future court appearances should not be deprived of his or her liberty if the charges against him or her are not punishable by a similar deprivation of liberty.

Another common international practice for limiting pretrial prisoners, which has been advocated as a best practice by the Hungarian Helsinki Committee (2013) and Schönteich (2014), is to set an upper limit to the legally permitted duration of pretrial detention. Numerous countries set time limits for the length of pretrial detention, often based on the seriousness of the alleged offences or the complexity of the case[9]. For instance, in England and Wales, the maximum period of pretrial incarceration is 182 days, whereas in France pretrial detention limits range from four months to four years, based on the penalties for ongoing charges. Similarly, Denmark limits pre-trial detention to two thirds of an alleged offence's maximum sentence, while in Albania the limit is set at one half of the maximum sentence. In many countries, such as England and Wales as well as the Czech Republic, pre-trial detainees must be released on bail once the maximum period of detention has been reached. These regulations are based on a belief that individuals should not be deprived of their liberty during the pre-trial phase for a period of time which is longer than the sentence which they would likely receive if found guilty of the charges against them. Having said this, while some countries seem to suggest that release (after the fixed limit is reached) is automatic, others allow for the possibility of applying for one or more extensions to the maximum length of detention based on exceptional circumstances. Variability also exists in terms of the types of acceptable releases. For example, when an individual is released in England following the

[8] For example, see the Hungarian Helsinki Committee [HHC] (2013) and Schönteich (2014).

[9] See, for instance, Fair Trials International (2011) for a summary of the pre-trial detention limits for numerous countries of the European Union.

expiration of a pretrial detention time-limit, the courts cannot require any surety, any payment or other financial obligation, nor can they impose a curfew.

With regards to bail compliance, some countries limit a criminal justice professional's ability to impose bail conditions so as to reduce the likelihood of eventual breaches. In order to impose bail conditions in New South Wales, Australia, these conditions must be deemed necessary and appropriate for addressing an identified bail concern, must be considered reasonable and proportionate to the charges, must be no more onerous than necessary and finally compliance must be considered reasonably practical and likely. If someone is released conditionally, a bail authority must justify and make record of why unconditional release was inappropriate, and why the specific conditions were necessary.

While many countries criminalize acts which contravene the conditions set out in a bail order as well as new substantive offences committed while on bail, some countries have more recently developed innovative alternatives to criminalization. For instance, in Scotland, all forms of misconduct (breaching conditions, failing to present in court, committing new offences) while on bail were historically considered separate offences requiring their own bail proceedings. However, in 1996, changes were made to Scotland's bail legislation which rendered the commission of a new offence while released on bail to be considered a 'bail aggravation' rather than a new offence. Thus, while breaches of a bail condition and the failure to appear in court have remained separate criminal offences, new substantive offences are no longer prosecuted separately. Rather, they are noted as aggravations to the original charge(s), and if found guilty of the initial offence, a court may (but is not required to) give an enhanced penalty (e.g. increased fine, longer term of incarceration). Brown, Leverick and Duff (2004) remarked in their evaluation of the bail aggravation policy that its implantation did not significantly change the offending rate while on bail between 1995 and 2001. Therefore, by pursuing new offences committed on bail as aggravations rather than separate cases, this policy has the potential to reduce court caseloads and delay as well as avoid further criminalizing individuals without threatening public safety.

Another model for bail non-compliance is New Zealand's *Bail Act 2000.* Under this Act, the breach of any bail condition is not criminalized, although failure to appear in court and the commission of new substantive offences remain separate criminal offences. The New Zealand Ministry of Justice (2011) notes that, "[a]s a matter of principle, it is considered unfair to punish a person for breach of a bail condition when they have not been found guilty of the original charge for which they were on bail" (para 57). In light of this, a breach, or "non-performance", of bail conditions will lead to an accused person being arrested and brought before the Court to have his/her bail reconsidered, with the potential to have bail revoked and be remanded into custody. If a judicial officer is satisfied that a breach occurred without lawful excuse, the breach may also be certified in court record so as to inform any future deliberations of bail. Unfortunately, evaluations on the impacts of this legislation could not be located at the time of this report.

Finally, the state of New South Wales, Australia has very recently implemented the *Bail Act 2013* which approaches bail breaches in a similar fashion to New Zealand. While in New South Wales it remains a criminal offence for an accused person to fail to appear in court and any new substantive charges continue to be pursued separately, the violation of bail conditions are not treated as separate criminal offences. If a police officer has reasonable grounds to suspect that an accused

person on bail has failed, or is about to fail, to comply with a bail condition(s), the officer is to use his or her discretion to decide whether to take no action, to issue a warning or a notice requiring the accused to appear before a court or authorized justice, or to arrest the accused and bring him or her before a court or justice as soon as possible. In making this decision, the officer is to consider the seriousness or triviality of the failure or threatened failure, whether the accused has a reasonable excuse for such a failure, the accused's personal attributes, as well as whether any alternative courses of action to arrest are appropriate given these circumstances. If an accused person is brought before the courts for failing to comply with a bail condition(s), a bail authority who is satisfied that the breach occurred may choose to release the accused on his or her original bail order, may vary the bail order, or, in cases when these first options are considered inappropriate, may revoke bail, whereby the accused is remanded into custody.

Given that these changes were assented to in 2013 and implemented only in May 2014, there is presently limited research available on the impact of this new bail policy. Weatherburn and Fitzgerald (2015) note in their general report on the impact of the *Bail Act 2013* that the remand population has increased since the implementation of the Bail Act. However, they explain that this trend had actually begun before the implementation of the Act. Furthermore, the authors suggest that this increase in the remand population can be attributed to (a) a sharp increase in January 2015 in the number (not the proportion) of bail breaches that resulted in bail refusal and (b) an increase in the total number of people with court proceedings commenced against them between December 2014 and March 2015.

IV – Where to Go From Here

Perhaps one of the most consistent observations throughout this report is the – sometimes dramatic – variability across time and space of several of the factors believed to impact the bail process. Largely independent of the level of aggregation (ie. regional, provincial/territorial or city level), significant differences emerged in not only police charging practices of administration of justice offences but also trends in remand populations (both in terms of admissions/counts as well as Indigenous representation). This overarching leitmotiv of variation runs counter to the natural assumption that problems in the bail process would be relatively similar across Canada. Indeed, despite federal legislation governing criminal law and procedure, provincial/territorial – and even city – 'culture' would appear to have its own impact, producing varying levels of 'local' practices.

Although surprising at first blush, this 'local' nature of factors related to the bail process become potentially more foreseeable when placed within the wider context of the risk aversive mentality which has increasingly characterized Canadian society. While this heightened concern with risks or potential dangers to public safety (from offenders) may be felt across the nation, what is identified as risky behaviour, who is perceived as risky and how much risk is deemed to be acceptable or unacceptable are likely to be questions which are answered at a distinctly more 'local' level. By extension, it would not be unexpected to see considerable variability across jurisdictions, cities and even potentially courthouses – for instance – in the types of offences that police target, the degree of discretion used by Crowns and judicial officers in bail court, and the number of accused detained in remand.

While arguably a natural response to our current risk-averse mentality, the problem that this 'local culture' raises for bail reform is that any solution tailored to a particular city or jurisdiction may have very diverse effects outside of this 'local' context. For instance, strategies to reduce the number of accused persons who fail to appear for a court appearance (e.g., telephone reminders the day before) might prove to be effective in Alberta or, more notably, Saskatchewan – jurisdictions with particularly high rates (per 100,000) of adults charged with this administration of justice offence – but have a considerably muted impact in Manitoba – a province with very low rates for this offence (for whatever reason). Indeed, the 'local' nature of problems related to the bail process would seemingly suggest 'local' solutions.

Notably though, one commonality across all levels of aggregation (regions, provinces/territories and cities) is that bail is not only 'broken' but is increasingly so. In other words, despite arguably different immediate factors causing the breakdown in the bail process and numerous diverse strategies implemented to address these 'local' issues, Canadians have been – at least to-date – unable to fix the problem on any acceptable scale. While it is always possible that continued 'local' efforts will ultimately prove more effective in the future, the seemingly systemic and endemic nature of the problem may suggest that we have moved beyond the ability to solve it through targeted tinkering.

Rather, more national strategies that address the underlying or foundational issues may need to substitute current piecemeal (often 'local') approaches which have been – in most cases – attacking mere manifestations of the wider problem. Said more directly, it may be time to (attempt to) change the current cultural climate of risk aversion and risk management which is largely at the root of our 'broken bail'. However, while arguably easy to say, the mechanisms to accomplish this task are less clear.

As sociologists will warn us, cultural change is no small undertaking. Indeed, our current concerns with bail/remand are not a recent phenomenon but the culmination of 2-3 decades of beliefs and practices which have gradually developed and pervaded the entire bail process. Within this context, there will be no easy or quick fixes. On the contrary, any effective solutions will have to be conceptualized as part of a multifactorial, long-term approach which understands that isolated changes will have little effect without altering the mentality of the criminal process more broadly. Indeed, the construction of a framework of general principles governing the bail process as well as the development of explicit guidelines of how they should be operationalized may likely need to be defined from 'above' while the actual (organizational and administrative) strategies for implementing them may be best conceptualized and negotiated at a more local level.

Within this context, and despite recognizing that the 'problem' is not the result of some unfortunate amendment to our bail laws, legislative change may constitute a viable first step in bringing about cultural transformation. On the one hand, new laws governing the bail process – particularly if they are clearly prescriptive for all decision makers – may be able to change 'local' practices in a more uniform way. On the other hand, traditional legislative processes involving meaningful consultation, cooperation and coordination among all key stakeholders may create buy-ins from the various jurisdictions.

In terms of actual legislative reform, it would seem useful to return – in a certain sense – to our past, reconceptualising bail as it was originally intended: a summary procedure which upholds and defends the presumption of innocence while ensuring – above all – the attendance of the accused in court. From there, the principles governing bail decisions (from the arresting officer through to the judicial officer at a court hearing) and the criteria to be used in these decisions should be reviewed and confronted with current practices in order to bring them (back) into line with this original conceptualization.

Clearly, this 'confrontation' should be empirically based. To this end, it would seem important to attempt to understand the various ways in which the present bail process has gone off the rails. For instance, it would seem valuable to explore why administration of justice charges appear to receive more serious sentences (i.e. a higher proportion go to prison) than violent offences against persons. As part of this objective, it may be worthwhile to understand if/why offences such as the violation of a condition of release are seen by the courts as more serious than violence. In a similar vein, given the growing number of offences apparently related to the failure to comply with conditions of release on bail, it would be important to know more about what types of actions by accused persons lead to police attention and if/when/how police officers use their discretion when laying charges. At the other end of the process, as the remand population is driven predominantly by those (few) accused who are (formally or informally) detained for lengthy periods of time, a more detailed description of this group might shed light on why/how to reduce their length of detention. It would also seem urgent to better understand what factors explain the growing number of Indigenous peoples who are entering prison as remand prisoners. Indeed, a more informed understanding of the processes underlying our current risk-averse culture in bail will go far in guiding new (more effective) legislation.

As part of this process, it may be useful to recognize that Canada is not alone in trying to fix its bail problem. Rather, numerous other nations are struggling with similar issues. While each country has its own conceptualization of the bail process, certain 'best practices' may serve as potential avenues of consideration which may be adapted to the Canadian reality. For instance, a number of nations have implemented rules which prohibit the use of pretrial detention for offences not punishable by incarceration. Recognizing that Canadian maximum penalties are somewhat unique in the sense that they are generally considerably higher than any sentence actually handed down, this regulation could be adapted to our reality by excluding all offences for which a prison sentence has never been used or, alternatively, offences for which the normal range of sentence never involves incarceration.

While a formidable task, it is becoming increasingly clear that real change in our current bail process will likely only be brought about through transformations in the broader mentality or the culture of bail. Indeed, it is precisely the new values or expectations which come from cultural change which give meaning and direction to more 'local' organizational and administrative alterations as well as instil commitment to them on the part of the key stakeholders. In a certain sense, it is this new mentality which re-focuses the principal players in the bail process on common, broader goals. Certainly in terms of the original conceptualization of bail, the current mentality is – in many respects – the antithesis of a summary procedure which upholds and defends the presumption of innocence. Indeed, it would seem that the whole notion of bail has become distorted.

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